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No. 04A226

In the Supreme Court of the United States

BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

MICHAEL RAY LOUNSBURY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

By statute and this Court's case law, a state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. This Court has held that in order to exhaust a claim a state prisoner must fairly present the substance of a federal habeas corpus claim to the state's highest court. This Court also has held that it does not matter that the state court might have had the opportunity to discover the federal claim on its own: that opportunity does not substitute for the state prisoner's obligation to fairly present his claim to the state court. The question presented is.

Does a state prisoner fairly present the "substance" of his federal habeas corpus claim to the state's highest court when he does not raise that specific legal and factual claim before that court, but instead raises only a related claim?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brian Belleque respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Lounsbury v. Thompson,* No. 02-35863 (June 29, 2004).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 374 F.3d 785, and is attached to this petition. App.-2. Neither the magistrate judge's findings and recommendation, nor the district court's order adopting those findings and recommendation, are reported. Both the magistrate judge's findings and recommendation, and the district court's order are attached. App.-16 ;App.-14

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals' opinion was dated and filed June 29, 2004. This petition is filed within the time granted by the extension of time allowed by Justice O'Connor on September 21, 2004.

STATUTE INVOLVED

28 U.S.C. § 2254 provides, in part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; * * *
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts

> of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

The issues raised in this case center on whether Lounsbury, the petitioner in this federal habeas corpus case, fairly presented in the state court the substance of his federal claim that he was not competent to stand trial. Specifically, the issues turn on whether Lounsbury presented the substance of that claim in the petition for review he filed with the state Supreme Court on direct review of his criminal convictions. This statement of the case will focus on that direct appeal and on the petition for review.

1. Lounsbury was charged in state court with aggravated murder.[1] Prior to trial, his attorneys filed a motion to determine his competency and fitness to proceed. Three hearings were held regarding Lounsbury's competency. At the final hearing, the prosecutor argued that the burden was on Lounsbury to prove that he was not competent to proceed to trial. The prosecutor contended that it was not the State's "burden to call witnesses, it's not our burden of persuasion [.]"

The state trial court disagreed. The judge said: "I don't agree with your observations, counsel, but it makes little difference to the Court. I think the order of proof is a matter of discretion with the Court." The court then invited Lounsbury's attorneys to call a witness, which they did, indicating that they were "prepared to go first."

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[1] The procedural history outlined here is taken from the Ninth Circuit's opinion and from the excerpts of record filed there.

Ultimately, the state trial court determined that Lounsbury was not "unable to assist and aid his counsel in the defense of his case." The court found "that he [was] capable of understanding the nature of the proceedings against him and assisting and cooperating with his counsel and participating rationally in his defense."

At trial, Lounsbury raised an insanity defense, which the jury rejected. He was found guilty of aggravated murder, and was sentenced to two consecutive life sentences without the possibility of parole.

2. Lounsbury appealed. In his brief filed with the state Court of Appeals he assigned error, in part, to the court's pretrial determination that he was competent to stand trial. Lounsbury argued that the trial court erred both in ruling on the burden-of-proof issue and in finding him fit to proceed. The Oregon Court of Appeals affirmed without opinion. *State v. Lounsbury*, 132 Or. App. 232, 888 P.2d 606 (1994).

3. Lounsbury then filed a petition seeking state Supreme Court review. Whether Lounsbury raised in that petition his substantive claim that he was not competent to stand trial is the central inquiry in this case. In his petition, Lounsbury presented only one question related to competency, *viz.*, "[m]ust the trial court adopt a burden of proof when determining whether a defendant is competent to proceed to trial?"[2] Lounsbury proposed that "the burden should be on the State to demonstrate [either] by a preponderance of the evidence [or by clear and convincing evidence] that the defendant is fit to stand trial." The entire argument regarding that issue that is set out in Lounsbury's petition for review follows:

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[2] The only other question presented in Lounsbury's petition for review dealt with the consecutive life sentences.

> No burden of proof was employed below in making the determination of fitness. Employing a standardless procedure in making this important determination denied defendant protections due under the State and Federal Constitutions, and is inconsistent with Oregon['s] statutory scheme.
>
> At trial the defense requested that the Court establish a burden of proof. App. 3 at 4. The aid and assist statute does not allocate the burden of proof. Or. Rev. Stat. 161.360 et seq. However, the state statutory standard for civil commitments places the burden on the state, by "clear and convincing evidence." Or. Rev. Stat. 426.130(1)(b). As argued by the defense, the worst that can happen to a defendant in a civil commitment case is detention for 180 days. Here, the subject of the fitness hearing was charged with aggravated murder. At a bare minimum, a burden of proof equal to the civil commitment procedure should have been allocated in this matter. In Federal competency proceedings, for example, the burden is on the prosecution to demonstrate by a preponderance of the evidence that the defendant is fit to stand trial. *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991).[3]

The section of Lounsbury's Court of Appeals brief, that had dealt with the substantive competency issue, is missing from his state Supreme Court petition for review. In a section

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[3] That argument is almost exactly the same as the burden-of-proof argument in Lounsbury's state Court of Appeals brief.

of his petition for review titled "reason giving this case importance," Lounsbury argued that:

> The two issues on which [he] s[ought] review are ones on which guidance from the Supreme Court is warranted. First, Oregon is [*sic*] statutory scheme is silent on the critical issue of the burden of proof in a fitness proceeding. Here, defense counsel below argued that their client was not able to aid and assist. He clearly suffered from a mental condition. However, he in fact went forward to trial and is now serving life without parole. No burden of proof was employed in making that determination.

The Oregon Supreme Court denied Lounsbury's petition for review without opinion. *State v. Lounsbury,* 320 Or. 569, 889 P.2d 1300 (1995).

4. Lounsbury later pursued state post-conviction relief, raising both the procedural and substantive competency claims. He contended that the trial court had erred because the court "applied a standardless test, including no identifiable burden of proof" in making the competency determination, and because he was required "to go forward to trial even though [his] trial counsel told the Court he was not able to aide [*sic*] and assist in his own defense[.]" The state post-conviction court ruled that neither issue was cognizable in that proceeding because each issue could have been raised, and was raised at least at some point, on direct appeal. Or.Rev.Stat. § 138.550(2) (post-conviction claims limited to those that were not "and reasonably could not have been asserted in the direct appellate proceeding"). The post-conviction court found that Lounsbury had "challenged [on direct appeal] the [trial] court's findings that he was able to aid and assist in his own defense," without specifying whether

he had raised that claim before the state Supreme Court, as well as the Court of Appeals.

Lounsbury appealed, but he did not raise any claim related to his competency. That failure is immaterial, however, because he could not properly raise either competency claim in post-conviction. The Oregon Court of Appeals affirmed without opinion, and the Supreme Court denied review without comment. *Lounsbury v. Thompson,* 157 Or. App. 397, 972 P.2d 1230 (1998), *rev. denied*, 328 Or. 594, 987 P.2d 514 (1999).

5. In his federal habeas corpus petition, Lounsbury raised both his substantive and procedural competency claims. He alleged that he had been denied due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution because "[t]he trial court required [him] to go forward to trial even though [his] trial counsel told the court that he was not able to aid and assist," and because "[t]he court applied a standardless test, including no identifiable burden of proof, in making its determination as to [his] fitness to proceed."

The magistrate judge and the district court ultimately agreed with the State's contention that Lounsbury had procedurally defaulted his substantive competency claim. The magistrate judge reasoned that Lounsbury had raised both "the questions of burden of proof and fitness to proceed as federal claims in his [Court of Appeals] brief," but that in his petition for review, he "raised only the question of burden of proof." The court "reject[ed] [Lounsbury's] implication that, because the question of fitness to proceed was raised in the court of appeals, it is raised in the supreme court because that court has the power to review claims not raised in the petition."

6. On appeal in the Ninth Circuit, Lounsbury again pursued his burden-of-proof claim. He also asserted that he had

"fairly present[ed] his claim of error concerning the determination that he was competent" to stand trial. That claim was "a corollary and subsidiary issue to his claim of error concerning failure to employ a burden of proof." He argued that the state trial court had erred "as a matter of due process" when it found him competent to stand trial.

Before this Court issued its decision in *Baldwin v. Reese*, 541 U.S. ___, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004), the Ninth Circuit rejected petitioner's procedural due process claim on its merits, but agreed with petitioner that he had not defaulted his substantive claim in state court. *Lounsbury v. Thompson*, 340 F.3d 998 (9th Cir. 2003).

After this Court issued its decision in *Baldwin v. Reese*, the Ninth Circuit Court of Appeals withdrew its opinion and asked Lounsbury and the State to brief further the issue of whether he had fairly presented his substantive competency claim to the state Supreme Court on direct appeal from his criminal convictions. Lounsbury argued that he had fairly presented that claim because it was a "logical corollary to the procedural issue represented by his challenge concerning the appropriate burden of proof." The State disagreed. Citing *Baldwin v. Reese* and other decisions, the State contended that Lounsbury had procedurally defaulted his substantive claim by failing to include it in the petition for review he filed with the state Supreme Court on direct review.

The Ninth Circuit Court of Appeals determined that Lounsbury had not procedurally defaulted his substantive competency claim. The court recognized that the pivotal "question is whether Lounsbury's state court petition for review fairly presented his substantive claim that he was tried while mentally incompetent." *Lounsbury v. Thompson*, 374 F.3d 785 (9th Cir. 2004). The court acknowledged that "[c]ompetency disputes can give rise to two distinct claims – substantive and procedural — that trigger different analyses

under the general heading of due process." *Id.* (citations omitted). The court also accepted that "Lounsbury worded his petition for review as a procedural challenge[.]" *Id.*

But the court determined that, despite those facts, the substantive claim had been fairly presented to the state Supreme Court. Although the substantive and procedural claims were "distinct," they were "sufficiently related [so] that exhausting the procedural (burden of proof) claim may also exhaust the substantive claim that the petitioner was tried while incompetent." *Id.* And, although the claim included in Lounsbury's petition for review was "worded" as a procedural one, "the clear implication of his claim was that by following a constitutionally defective procedure, the state court erred in finding him competent." *Id.* Because the substantive and procedural claims were "as intertwined as they are here," presenting the latter also served to present the former. *Id.*

The Ninth Circuit Court of Appeals also felt that it would be "inappropriate" to impute to Lounsbury's direct appeal attorneys "a strategic choice to abandon the substantive claim." *Id.* That imputation would not be appropriate because "[c]riminal defense attorneys in Oregon are required to conform their arguments [made in a petition for review] to two demands that are in some tension with each other[.]" *Id.* The court concluded that tension exists between the requirement that criminal defendants must seek state Supreme Court review in order to exhaust their state remedies, and the requirement that a petition for review include a section explaining "why the issues presented have importance beyond the particular case and require decision by the Supreme Court." Or. R. App. Proc. 9.05(4)(a)(vi).[4]

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[4] As the Ninth Circuit's decision correctly points out, some of the pertinent provisions of the state's rules of appellate procedure "were numbered differently when Lounsbury submitted his petition

In the Ninth Circuit's sole citation to *Baldwin v. Reese,* the court cited it for the proposition that "the Oregon rules require litigants seeking discretionary review to explain why the questions presented have special importance." *Lounsbury,* at 789. The court suggested that "[t]his aspect of the Oregon Rules of Appellate Procedure is different from the state law rule discussed in *O'Sullivan* [*v. Boerckel,* 526 U.S. 838 (1999)], in which the rule endeavored merely to provide guidance on what cases would be suitable for discretionary review." *Id.* at n. 3. The court opined that "one *could* view discretionary relief as simply unavailable in Oregon for fact-based claims[.] *Id.* (emphasis in original).

"Against this backdrop," the court concluded that "Lounsbury adequately exhausted his substantive competency claim." The substantive competency claim: (1) "was closely related to" the burden-of-proof claim; (2) if review had been granted, the Oregon Supreme Court "could have reached the substantive competency issue * * * because it was squarely raised in the Court of Appeals brief;" (3) the petition's "text" "includes the substantive claim;" and (4) on review of the procedural issue, the court "could have discussed the strength of the substantive competency claim in the course of conducting a harmless error analysis[.]" *Id.* at 789. The district court had "erred in deciding that Lounsbury's claim was barred by procedural default. It was presented, and rejected by, the state courts." *Id.* at 789-90. The court remanded the claim to the district court. The court determined that the district court correctly rejected Lounsbury's procedural due process claim; with respect to that claim, "the state trial court reasonably applied federal law." *Id.* (citation omitted).

[for review] to the Oregon Supreme Court in 1995." *Lounsbury,* at 788 n. 2. But, as the court determined, "the relevant content has remained unchanged in each instance." *Id.* at 788-89 n. 2.

REASONS FOR GRANTING THE WRIT

To fairly present a federal claim in state court, a state prisoner must present the substance of that claim to the state courts, including a state Supreme Court that has discretionary review. That requirement advances principles of comity and preserves the state courts' opportunity to consider federally-based challenges to state convictions first in state court. In a series of decisions rendered during the past few decades, this Court consistently has stressed the importance of the fair presentation requirement and has corrected the course when lower federal courts have sought to loosen or lessen the fair presentation requirement.

In this case, the Ninth Circuit again sought to broaden the fair presentation requirement that this Court has narrowed in its case law. In its opinion, the Ninth Circuit acknowledged that "[c]ompetency disputes can give rise to two distinct claims – substantive and procedural – that trigger different analyses under the general heading of due process." *Lounsbury,* 374 F.3d at 788. The court also accepted that Lounsbury had "worded his [state Supreme Court] petition for review as a procedural challenge[.]" *Id.* Under this Court's case law, that should have been the end of the matter. Lounsbury simply had not presented to the state Supreme Court – fairly or otherwise — the substantive claim he raised in federal habeas.

But the Ninth Circuit deviated from the fair presentation requirement. It held that presenting in state court a claim that, although admittedly distinct from the one raised in federal court, was nevertheless closely related to that claim, was enough to satisfy the fair presentation requirement. That ruling could serve to expand significantly the range of issues that can be raised in federal habeas corpus cases, even though they are at most merely related to, and are not the same as, the ones raised in state court. Such a result would severely undermine the principles of comity that underlie the exhaustion

requirement and substantially weaken the fair presentation requirement.

The Ninth Circuit's decision further offends the principles of comity by reading the state's rules of appellate procedure in a fashion that is at odds with the state court's interpretation of them. The Ninth Circuit's reading of the state's rules would, in effect, force the state Supreme Court either to consider the merits of claims not presented to it or to forgo the opportunity to consider the merits of those claims in the first instance. As this Court has held, a federal court should not seek to alter state appellate court practice in such a fashion.

The Ninth Circuit's decision in this case also reflects another fundamental error. The court, in effect, shifted the burden of proof regarding fair presentation onto the state by assuming that a state prisoner's attorneys would not have abandoned a federal claim in state court, unless there was some reason to assume that they would have done so. 374 F.3d at 788 (refusing "to impute" to Lounsbury's direct appeal attorneys "a strategic choice to abandon the substantive [competency] claim"). That approach, which the Ninth Circuit has employed before, turns the fair presentation requirement on its head. No longer must a state prisoner show that he fairly presented a claim. Rather, it will be assumed that he (or his attorneys) did enough, absent some reason to suppose that they did not.

Despite this Court's directive that federal claims must be clearly and fairly presented to state courts first, most circuits have not followed the Court's lead. The federal circuits continue to apply varying and inconsistent tests in determining whether a state prisoner has fairly presented his federal claim in state court. This Court's further guidance is needed to resolve the circuit split on this issue that is of great significance to the states, to state courts, to lower federal courts, and to the principles of comity.

I. The Ninth Circuit's decision conflicts with the logic of and rationale underlying this Court's "fair presentation" jurisprudence.

In its case law dealing with the "fair presentation" requirement, this Court has attempted to make plain what appears to have eluded the Ninth Circuit Court of Appeals in this case, that is, that

> 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claims. [*Picard v. Connor*, 404 U.S. 270], at 276-277 [(1971)]. It is not enough that all the facts necessary to support the federal claim were before the state courts, *id.*, at 277, or that a somewhat similar state-law claim was made* * *. In addition, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. *Picard*, *supra*, at 275. *Cf. Rose v. Lundy*, 455 U.S. 509, 518 (1982).

Anderson v. Harless, 459 U.S. 4, 6 (1982) (additional citations omitted). As the federal courts of appeal have struggled with the "fair presentation" requirement, over the last few decades this Court has clarified and refined precisely what that requirement demands of a federal habeas petitioner. Yet the message seems not to have gotten through. The Ninth Circuit's ruling in this case – *viz.*, that raising one claim in state court serves also to exhaust other, "closely related" claims, 374 F.3d at 789 – is fundamentally incompatible with this Court's decisions.

A. The Ninth Circuit's approach is inconsistent with this Court's "fair presentation" case law.

The analytical errors committed by the Ninth Circuit in this case can only serve to further confuse an already murky area of the law, at least in the lower federal courts. The Ninth Circuit's approach also represents the latest variation on a theme that this Court repeatedly has rejected. This Court consistently has turned back the efforts of state prisoners and lower federal courts to broaden the reach of those courts into issues not directly and squarely presented first in state court. This case calls once again for such corrective action by this Court. A review of this Court's relatively recent fair presentation case law should serve to demonstrate how this Court has turned aside lower court attempts to loosen that requirement and how the Court has emphasized that fair presentation requires that a state prisoner expressly and clearly tell a state court what federal claims are being raised.

In *Picard v. Connor*, 404 U.S. 270 (1971), in state court the petitioner had challenged, on state-law grounds, an amendment made to the indictment filed against him. In federal habeas, the court of appeals decided the case on equal protection grounds, however. In holding that the petitioner had not fairly presented that claim to the state courts, this Court emphasized the comity concerns that underlie the exhaustion requirement.

> *The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. §§ 2254(b) and (c), reflects a policy of federal-state comity* * * *, "an accommodation of our federal system to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson*, 404 U.S. 249, at 250 [(1971)]. We have consistently adhered

> to this federal policy, for it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state court to correct a constitutional violation.

Picard, 404 U.S. at 275 (emphasis added; some citations and footnote omitted).

Because the exhaustion requirement is designed "to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution,' *Ex parte Royall*, [117 U.S. 241,] at 251 [(1886)], it is not sufficient merely that the federal applicant has been through the state courts." *Picard,* 404 U.S. at 275-76. "Accordingly, *we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.*" *Id.* at 276 (emphasis added; citations omitted). That is, "*the substance* of a federal habeas corpus claim must first be presented to the state courts." *Id.* at 278 (emphasis added). Because "[t]he claim that an indictment is invalid is not the *substantial equivalent* of a claim that it results in an unconstitutional discrimination," raising the first claim in state court did not serve to fairly present the second one. *Id.* (emphasis added).

In *Anderson v. Harless*, in state court the petitioner had challenged an instruction given at his criminal trial, citing only state cases based on state law. 459 U.S. at 7. The court of appeals nevertheless decided that the petitioner had fairly presented a due process claim in state court. The federal court of appeals believed that "'the due process ramifications' of [the petitioner's] argument to the [state] court 'were self-evident'[.]" *Id.* (quoting court of appeals' opinion). This Court disagreed. Citing *Picard*, this Court again "made clear" that a federal habeas petitioner "must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." *Id.* at 6. "It is not enough" that the petitioner presented

all the facts to the state courts, "or that a somewhat similar state-law claim was made." *Id.*

Next, in *Vasquez v. Hillery*, 474 U.S. 254 (1986), this Court held that offering additional factual material in support of a claim in federal court is permissible "when the prisoner has presented the *substance* of his claim to the state courts. *See Picard*, [404 U.S.] at 278." 474 U.S. at 258 (emphasis added). The additional evidence offered there "did not fundamentally alter the legal claim already considered by the state courts." *Id.* at 260.

In *Duncan v. Henry,* 513 U.S. 364 (1995), the petitioner's claim for relief had morphed from a trial-level evidentiary objection, to a state-constitutional claim of "miscarriage of justice" made on appeal, to a federal due process claim advanced in federal court. *Id.* at 364-65. This Court reiterated that, to give state courts an opportunity to rule on federal claims, those courts "must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Id.* at 365-66. In *Duncan v. Henry,* the petitioner had failed to do that. The standards of review that applied to his evidentiary and due process claims were "no more than somewhat similar." *Id.* at 366. "Both *Picard* and *Harless* emphasized that mere similarity of claims is insufficient to exhaust." *Id.* (citations omitted). And the petitioner's failure to have raised his due process claim in state court was "especially pronounced" because he had relied on due process as the basis for another claim. *Id.*

Grey v. Netherland, 518 U.S. 152 (1996), may be the case in this series that is most like this one because it involved what might have been seen as "related" claims. In *Grey*, in federal habeas corpus the petitioner relied on two due process claims regarding the prosecution's introduction of "other crimes" evidence. One claim dealt with the adequacy of the prosecution's notice as to the evidence it intended to intro-

duce, and the other alleged that the prosecution had misled the petitioner as to the nature of the evidence. *Id.* at 162, 164. This Court repeated that, "for purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Id.* at 162-63. "[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* Because there was some uncertainty as to whether the State had raised the defense of procedural default, however, this Court remanded. *Id.* at 165-66.

In *O'Sullivan*, this Court clarified that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review procedures," and that discretionary review by a state's highest court "is a normal, simple, and established part of the State's appellate review process." 526 U.S. at 845. In that case, the petitioner argued that "all routine claims of error are directed at" the state intermediate appellate courts, and that "[t]he [state] Supreme Court, by contrast, serves only to answer questions of broad significance." *Id.* at 845-46. The petitioner read the state's appellate-procedure rules as "discourag[ing] the filing of petitions raising routine allegations of error[.]" *Id.* at 846.[5]

This Court rejected the argument that review in the state Supreme Court was "unavailable" for routine claims of error. *Id.* at 846. The state rule "by its own terms, * * * does not 'contro[l]' or 'measur[e]' the [state] Supreme Court's discretion." *Id.* at 846. Instead, the state court was "free to take

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[5] The state rule listed factors the court might consider in deciding whether to grant review, including "'the general importance of the question presented.'" *Id.* at 843, quoting state rule.

cases that do not fall easily within the descriptions listed in the Rule." *Id.* And, even if one were to assume that the rule discouraged the filing of some petitions, "it is difficult to discern which cases fall into the 'discouraged' category." *Id.*

In the final decision in this series, *Baldwin v. Reese*, this Court emphasized again that "[t]o provide the State with the necessary 'opportunity' [to confront the federal issue], the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." 158 L. Ed. 2d at 69 (citations omitted). This Court rejected the Ninth Circuit's view that because the state Supreme Court judges would have had the "opportunity" to discover the prisoner's federal claim if they had looked past his petition for review to the state trial court's decision, that "opportunity" sufficed for purposes of the fair presentation requirement. Such a "requirement would force state appellate judges to alter their ordinary review practices." *Id.* at 70. Moreover, "the requirement imposed by the Ninth Circuit would unjustifiably undercut the considerations of federal-state comity that the exhaustion requirement seeks to promote." *Id.* at 71. The Court "consequently h[e]ld that ordinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Id.*

B. The Ninth Circuit's decision significantly erodes the fair presentation requirement, and it undercuts the principles of comity that underlie the "fair presentation" requirement.

The Ninth Circuit's decision in this case cannot be squared with this Court's "fair presentation" jurisprudence. The Court of Appeals' decision can serve only to further con-

fuse the analysis of this issue of considerable importance to the States and to state and federal courts. The decision also undermines the principles of comity that underlie the "fair presentation" requirement, and it substantially dilutes the requirement.

To reiterate, the Ninth Circuit recognized that Lounsbury's substantive and procedural issues regarding the competency determination made in state court amounted to "two distinct claims" that "trigger different analyses under the general heading of due process." 374 F.3d at 788. The court also accepted that "Lounsbury worded his petition for review as a procedural challenge." *Id.* Nevertheless the court concluded that presenting the procedural claim served to fairly present the substantive claim as well because the two claims were "sufficiently related," and "intertwined." *Id.* Lounsbury "adequately exhausted his substantive competency claim" because: (1) it was "closely related to, and concerned the very same trial court ruling as, the claim that was concededly adequately raised;" (2) the state Supreme Court "could have reached the substantive competency issue had review been granted because it was squarely raised" before the state Court of Appeals; (3) the "text of the petition include[d] the substantive claim;" and, (4) if the state Supreme Court had accepted review "even over the procedural issue only, it could have discussed the strength of the substantive competency claim in the course of conducting a harmless error analysis for the procedural competency claim." *Id.* at 789.

1. The Ninth Circuit undermined the fair presentation requirement by holding that presentation of a closely related claim is enough.

Each of the points relied on by the Ninth Circuit conflicts with this Court's decisions. First, even assuming that Lounsbury's substantive competency claim is "closely related to" his procedural claim regarding the applicable burden of proof

– an assumption that is supported only by the fact that both claims relate to the ultimate determination of his competency – this Court has said that claims must be the "substantial equivalent" of each other for the presentation of one also to present the other. *Picard,* 404 U.S. at 278. "[M]ere similarity of claims is insufficient to exhaust." *Duncan*, 513 U.S. at 366. The Ninth Circuit's exception for "closely related" claims is at odds with this Court's requirement that the "substance" of the federal-court claim must also have been fairly presented in state court. *Anderson v. Harless,* 459 U.S. at 6. Here the substantive competency claim was not presented at all to the state Supreme Court. That being so, it is difficult to see how the "substance" of the claim can have been presented.[6]

2. The Ninth Circuit repeated an analytical error condemned in *Baldwin v. Reese*: the court substituted a state court's opportunity to find a federal claim, for a habeas petitioner's obligation to present the claim.

The Court of Appeals' second and fourth reasons for concluding that Lounsbury "adequately exhausted his substantive competency claim" – *viz.*, that if the state Supreme Court had granted review it "could have reached the substantive competency issue," either because it had been raised below, or "in the course of conducting a harmless error analysis for the procedural competency claim," 374 F.3d at 789 – appear to amount to variations on the theme that the Ninth Circuit sounded in *Baldwin v. Reese*, and that this Court determined

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[6] Fair presentation demands that both the pertinent facts and the federal legal claim must be put before the state courts. *Anderson v. Harless*, 459 U.S. at 6. Although the state's briefing and the Ninth Circuit's decision focus on whether Lounsbury adequately presented his legal claim that he was not competent, his petition for review also failed to put the relevant facts before the court.

clashed with the fair presentation requirement. To repeat, in *Reese* this Court rejected the Ninth Circuit's view that, because state Supreme Court judges might discover a federal claim by reading past a petition for discretionary review, therefore the claim was fairly presented to them. A state judge's "opportunity" to discover a federal claim cannot substitute for a federal habeas petitioner's obligation to fairly present that claim in state court. 158 L. Ed. 2d at 70-71. Instead, the requirement demands that a petitioner have alerted the state court to his federal claim; it is not satisfied because a court might simply have found the claim on its own. *Id.*

Admittedly, in *Reese* the precise issue the Ninth Circuit focused on was whether the state court might have found the federal claim by reading beyond the face of a petition seeking review; this Court's response was that that "opportunity" did not substitute for the required fair presentation. But the principle that state court "opportunity" does not excuse a failure to exhaust applies with equal force to the Ninth Circuit's observation here that, had the state Supreme Court granted review, it might have reached the substantive competency issue even though Lounsbury had not raised it in his petition for review. In short, even if the Ninth Circuit was right about what the state Supreme Court might have done had it granted review, that court's supposed opportunity to reach the substantive competency issue says nothing about whether Lounsbury fairly presented that issue in state court. Comity demands fair presentation, and is not satisfied merely by the happenstance that a state court might have reached an issue on its own.[7]

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[7] In any event, it is by no means certain that the state Supreme Court would have reached the substantive competency issue if it had granted review to consider the procedural burden-of-proof claim. For example, even if the court had agreed with Lounsbury

3. The Ninth Circuit's decision violates principles of comity: the court did not give proper deference to the state court's rules and practices; the court's misreading of state practice could force state courts to alter their procedures or to forgo the opportunity to consider federal claims first.

The Ninth Circuit's assumptions about what the state Supreme Court might have done had it granted review offend comity in additional respects. First, the court assumed that the state Supreme Court could have reached the substantive competency issue "because it was squarely raised" before the state Court of Appeals. 374 F.3d at 789. That assumption is at odds with the state rules of appellate procedure and with the state Supreme Court's customary practice. The assumption conflicts with principles of comity because it fails to afford proper deference to a state court's procedural rules.

Or. R. App. P. 9.05(4)(a)(ii), (iii), requires every petition for Supreme Court review to include a concise statement of the legal question(s) presented and of every reason asserted for reversal. If review is granted, the petitioner may file a brief on the merits, but that brief "may not raise additional questions or change the substance of the questions already presented." Or. R. App. P. 9.17(2)(b)(i). That is, under the state's rules, a party seeking review is limited to the issues raised in that party's petition for review, even if review is granted.

If the state Supreme Court grants review, "the questions before" it "include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court." Or. R. App. P. 9.20(2). "The

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that the burden should be on the state, it might have determined that the trial court had required the state to shoulder the burden of proof.

court [also] may consider other issues that were before the Court of Appeals." *Id.* The court's customary practice, however, is to require that issues be raised in the petition for review. *See, e.g., State v. Dahl*, 336 Or. 481, 485 n. 4, 87 P.3d 650 (2004) (declining to consider issue not raised in petition for review); *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 541 n. 3, 548 n. 8, 17 P.3d 473 (2001) (same); *Stupek v. Wyle Laboratories Corp.*, 327 Or. 433, 437, 963 P.3d 678 (1998) (court "ordinarily" will not consider issues not raised in petition for review).

To rely, as the Ninth Circuit did, on the possibility that the state Supreme Court might have considered the substantive claim, had it granted review on the procedural issue, is not only to make an assumption that is contrary to the state court's customary practice, it is tantamount to "forc[ing] state appellate judges to alter their ordinary review practices." *Reese*, 158 L. Ed. 2d at 70. That is, the Ninth Circuit's decision forces the state Supreme Court to consider all issues properly raised before the state Court of Appeals or else "forfeit the State's opportunity to decide that federal claim in the first instance." *Id.* Such forcible reshaping of state appellate court procedure by a federal court is among the errors *Reese* condemns.

The Ninth Circuit made a second erroneous assumption about state appellate practice. The court read the state's rules of appellate procedure as forbidding the inclusion in a petition for review of any case- or fact-specific claim. 374 F.3d at 789 ("Under Rule 9.05(7)(f) & (8), it appears that a claim that the Court of Appeals erred in a case-specific way could not properly be expressly raised in a petition for review"). That is plainly not what the rule provides. Or. R. App. P.

9.05(4)(a)(vi) and (b)[8] require a petition for review to include "[a] statement of specific reasons why the issues presented have importance beyond the particular case and require decision by the Supreme Court," and the rule provides that "[a]n assertion of the grounds on which the decision of the Court of Appeals is claimed to be wrong, without more, does not constitute compliance with" that rule. But the rule does not prohibit the inclusion of case- or fact-specific claims, which commonly are included in petitions for review in Oregon. Moreover, the non-exclusive list of reasons why an issue might merit review is rather expansive. It includes, for example, "[t]he use or effect of a rule of trial court procedure[.]" Or. R. App. P. 9.07(1)(e). Thus, counsel almost always can find some way to claim, albeit perhaps not persuasively, that an issue is significant and review-worthy.

In concluding that fact- or case-specific issues cannot properly be included in a petition for review in Oregon, the Ninth Circuit also overlooked the express statement in the state's rules regarding the extent of the Supreme Court's discretion over the decision whether to grant or deny review. Or. R. App. P. 9.07, which lists illustrative reasons why a case might merit review, begins with the proviso that:

> The Supreme Court considers the items set out below [in the rule] to be relevant to the decision whether to grant discretionary review. These criteria are published to inform and assist the bar and the public. They are neither exclusive nor binding. *The court retains the inherent authority to allow or deny any petition for review.*

(Emphasis added).

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[8] The Ninth Circuit gave an incorrect citation for the pertinent rule. The current citation is set out above.

That provision is strikingly similar to the proviso set out in the Illinois rule discussed in *O'Sullivan v. Boerckel,* which also listed reasons why a case might merit review, including "'the general importance of the question presented,'" but which also provided that the rule did not "'control[] nor fully measure[] the court's discretion.'" 526 U.S. at 843, quoting state rule. In that case, this Court rejected the petitioner's argument that the state rule meant that state Supreme Court review was not available for routine claims of error. Because the state rule "by its own terms, * * * does not 'contro[l]' or 'measur[e]' the [state] Court's discretion," this Court could not conclude from the rule "that review in the [state] Supreme Court is unavailable" for routine claims. 426 U.S. at 846.

The Oregon rule of appellate procedure is not meaningfully distinguishable from the Illinois rule discussed in *O'Sullivan*. Both rules do not limit the state Supreme Court's discretion to grant or deny any petition – indeed, the Oregon rule expressly states that the court "retains the inherent authority to allow or deny any petition for review" – and thus, from the rule alone it cannot be concluded that review of case- or fact-specific claims is unavailable. The Ninth Circuit's decision to the contrary is inconsistent with *O'Sullivan* and does not sufficiently respect the state court's express statement regarding its own inherent authority. Again, comity is not served when a federal court describes state appellate practice in a way that is at odds with the state's rules of appellate procedure, and that may force the state courts either to alter their procedures to match the federal court's view of them or to forfeit the opportunity to address federal claims first before they are raised in federal court.

4. The Ninth Circuit significantly devalued the fair presentation requirement by indicating that a mere passing reference to an argument made in a state trial court serves to fairly present that legal argument to an appellate court.

The Ninth Circuit also suggested that Lounsbury had fairly presented his substantive competency claim in his state petition for review because he had "include[d]" it in the "text of [his] petition[.]" 374 F.3d at 789. That apparently is a reference to part of a paragraph included in the petition. In arguing that his petition for review merited Supreme Court review, Lounsbury's attorney contended that the issues on which he sought review were "ones on which guidance from the Supreme Court was warranted."[9] He noted that the state "statutory scheme is silent on the critical issue of the burden of proof in a fitness proceeding." He added that: *"Here, defense counsel below argued that their client was not able to aid and assist. He clearly suffered from a mental condition. However, he in fact went forward to trial* and is now serving life without parole. No burden of proof was employed in making that determination." (Emphasis added).

Perhaps the language emphasized above might have given the Oregon Supreme Court an "opportunity" to intuit that Lounsbury possibly might be raising a substantive competency claim, but that seems unlikely and would not be sufficient in all events. The only issue pertinent to competency raised in the petition was whether the trial court had erred in not adopting a burden of proof when ruling on competency. Thus, read in context, the above-emphasized language was simply part of Lounsbury's attorneys' attempt to show why the burden of proof claim warranted review. Any substantive

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[9] The two issues were the procedural issue regarding the burden of proof and a sentencing issue: whether it was permissible for him to receive consecutive life sentences.

claim that may be lurking in that language is elusive at best, and the language used at most would have given the state court only the (legally insufficient) "opportunity" to guess that Lounsbury might be raising such a claim.

5. The Ninth Circuit mistakenly reasoned that, unless it was apparent why a claim was omitted from a state petition for review, the claim must be included; that assumption turns fair presentation on its head.

The Ninth Circuit also inverted the fair presentation requirement when it reasoned that it should be assumed that Lounsbury's attorneys included the substantive competency claim in his state Supreme Court petition for review because otherwise the court would have "to impute a strategic choice to abandon the substantive claim." 374 F.3d at 788. To reiterate, it is a state prisoner's obligation to fairly present his federal claims first in state court. If he does not, it matters not why he (or his attorneys) failed to meet that obligation (except perhaps with regard to a claim of ineffective assistance of counsel). Whether the prisoner's or his attorney's reasons for omitting a claim are good or bad, if the claim has not been fairly presented in state court, and if no state court avenues of redress remain open, then the claim has been procedurally defaulted.[10]

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[10] In its en banc decision in *Peterson v. Lampert,* 319 F.3d 1153, 1159 (9th Cir. 2003), the Ninth Circuit also made the mistake of inquiring into why a federal claim was not raised in state court. There the court hypothesized that a federal claim was left out of the state petition for review because of "a strategic choice by counsel not to present the federal issue in the hope of convincing the Oregon Supreme Court to exercise its discretion to grant review." *Id.* The court's inquiry into why a federal claim was or was not raised in state court distorts the analysis, which should focus on whether a federal claim was fairly presented in state court, not why it was or was not.

The court of appeals' refusal "to impute [to Lounsbury's attorney] a strategic choice to abandon the substantive claim" also substitutes an assumption that a claim has not been abandoned for a habeas petitioner's affirmative obligation to fairly present his federal claim in state court. Simply put, it is the habeas petitioner who must show that he fairly presented his federal claims in state court, not the state that must refute the assumption that, if he had no apparent reason for abandoning a claim, therefore he must not have done so.

6. Summary of Arguments

In sum, the Ninth Circuit's decision cannot be squared with the rationale and the results of this Court's fair presentation case law. To conclude that a federal habeas corpus petitioner has presented his federal claim in state court merely because he has presented a related claim is to undermine this Court's case law requiring that the "substance" of the federal claim must be presented and that the presentation of somewhat similar claims does not suffice. *Picard; Anderson v. Harless*. Such an approach also undermines the principles of comity that motivate the fair presentation requirement.

The court of appeals' decision in this case represents yet another attempt to stretch the limits of the fair presentation requirement: so that the presentation of a related claim suffices, so that a state court's opportunity to find a federal issue on its own is substituted for the obligation to present a federal claim in state court, or so as to create a presumption that, if no reason to abandon a federal claim is apparent, then it must not have been abandoned. All of those attempts to loosen the fair presentation requirement are at odds with this Court's insistence that federal claims must be fairly, directly and squarely presented first in state court.

Moreover, to misread the state's rules of appellate procedure, as the Ninth Circuit did, is both to fail to give deference

to the state court's reading of its own rules and to force the state either to deviate from its usual practice or to forgo the state's opportunity to address federal claims in the first instance. The state understands that the correct reading of the Oregon rules of appellate procedure, which the state contends the Ninth Circuit misread, is not *per se* an issue of national, or even regional, significance. Nonetheless, as in *Reese,* the Ninth Circuit has persisted in interpreting state appellate court rules on its own, while ignoring state court precedent and sometimes even the text of the rules themselves. Such an approach is an affront to the principles of comity that should apply in this area. In this instance, the approach also led the court to a result that is in conflict with the result reached in *O'Sullivan.*

The state also understands that this Court reviewed a fair presentation issue only last term in *Reese*. Few, if any, issues arise as often in federal court litigation, however, or trouble lower federal courts as much. The Ninth Circuit's decision in this case can only serve to add to the confusion and the potential for inconsistent results in this area of the law that is of considerable importance to the states and to federal courts faced with a flood of habeas corpus cases. Moreover, as shown below, the lower federal courts remain split over how to interpret and apply the fair presentation requirement.

II. The federal circuits apply varying and inconsistent tests in determining whether a state prisoner has "fairly presented" a federal claim in state courts.

Notwithstanding this Court's clear direction in its fair presentation case law that federal claims must be clearly and directly presented first in state court, the federal circuits continue to utilize varying tests to determine whether a state prisoner has "fairly presented" his federal claim in state court. Two circuits generally apply a "strict presentation" requirement. *See, e.g., Baker v. Corcoran*, 220 F.3d 276 (4th Cir.

2000), *cert. denied*, 531 U.S. 1193 (2001); *Isaacs v. Head*, 300 F.3d 1232, 1254 (11th Cir. 2002). Other courts apply a multi-factor test that is much less exacting. *See Ramirez v. Attorney General*, 280 F.3d 87, 90, 94-95 (2nd Cir. 2001); *McCandless v. Vaughn*, 172 F.3d 255, 261 (3rd Cir. 1999); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001); *Barrett v.* Acevedo, 143 F.3d 449, 453-54 (8th Cir. 1998), *on reh.*, 169 F.3d 1155 (8th Cir.) (en banc), *cert.* denied, 528 U.S. 846 (1999).

The inconsistency regarding the general test that should apply to issues of fair presentation persists when the issue, more precisely, is whether the claim presented in federal court is similar enough to a claim presented in state court for the presentation of the state-court claim to be enough to "fairly" present the substance of the federal claim. The First Circuit appears to use an approach akin to that employed by the Ninth Circuit in this case. *See Williams v. Holbrook*, 691 F.2d 3, 7-8 (1st Cir. 1982) (burden-of-proof issue not expressly raised in state court nevertheless was fairly presented because it was "closely interwoven" with another claim raised there). The Second and Seventh Circuits also apply relatively relaxed standards when deciding whether the "substance" of a federal claim was fairly presented in state court. *See Dorsey v. Kelly*, 112 F.3d 50, 53 (2nd Cir. 1997) (general complaint in state court brief about adequacy of attorney's preparation fairly presented claim regarding particular evidence); *Boyko v. Parke*, 259 F.3d 781, 788-89 (7th Cir. 2001) (one state-court claim of ineffective assistance of counsel fairly presented another such claim raised in federal court; second claim was not "entirely independent" of the first). In contrast, the Third and Fourth Circuits apply a stricter standard. *Doctor v. Walters*, 96 F.3d 675, 679-80 (3rd Cir. 1996); *Townes v. Murray*, 68 F.3d 840, 846 (4th Cir. 1995) ("The ground relied upon must be presented face-up and squarely") (internal quotation marks omitted).

Indeed, even within the same circuit the tests applied are not always the same. *See McNair v. Campbell*, 315 F. Supp. 2d 1179, 1184 (M.D. Ala. 2004) (noting inconsistency in Eleventh Circuit's decisions). The Ninth Circuit is another example of such inconsistency. *Compare Casey v. Moore*, ___ F.3d ___, 2004 US App LEXIS 21171 (2004) (slip op. 14455) (rejecting the "essentially the same" standard for assessing whether the presentation in state court of one claim serves to exhaust another), *Castillo v. McFadden*, 370 F.3d 882, 889-90 (majority), 892 (dissent) (2004), and *Lounsbury*.[11]

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the court below. Alternatively, in view of the conflict of the decision below with the rationale and holdings of past decisions of this Court, the Court may wish to consider summary reversal.

Respectfully submitted,

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October 27, 2004

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[11] All three of these Ninth Circuit decisions were issued after and discuss this Court's decision in *Reese v. Baldwin*, but the court of appeals' understanding of that decision varies from case to case.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL RAY LOUNSBURY,	No. 02-35863
Plaintiff-Appellee,	D.C. No. CV-99-01135-MRH/JPC
v.	
FRANK S. THOMPSON,	ORDER
Respondent-Appellee.	

Filed June 29, 2004

Before: Alfred T. Goodwin, Procter Hug, Jr., and Marsha S. Berzon, Circuit Court Judges.

ORDER

A judge of this court sua sponte called for en banc reconsideration. The call failed to receive a majority vote of the active, non-recused judges.

The opinion filed August 22, 2003, slip op. 11905, and appearing at 340 F.3d 998 (9th Cir. 2003), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit. A new opinion shall be filed.

The parties are instructed that no further filings will be accepted in this case. The mandate shall issue forthwith.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL RAY LOUNSBURY, No. 02-35863

Plaintiff-Appellee, D.C. No. CV-99-01135-MRH/JPC

v.

FRANK S. THOMPSON, OPINION

Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Argued and Submitted
July 8, 2003—Portland, Oregon

Filed June 29, 2004

Before: Alfred T. Goodwin, Proter Hug, Jr., and Marsha S.Berzon, Circuit Court Judges.

Opinion by Judge Goodwin

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that a petitioner who limited his final state habeas appeal to a procedural competency challenge can make a fair presentation to the state courts of his substantive

competency claim where the substantive and procedural competency claims are intertwined.

After making his way through Oregon state post-conviction proceedings, appellant Michael Lounsbury petitioned for habeas corpus in federal district court, claiming that he was denied due process of law and equal protection of the law. Lounsbury divided his federal claim into two parts: (1) that he was tried when he was not mentally competent, and (2) that the state courts had denied him due process by ignoring his argument that the burden of proof to show incompetency lay with the defense because Oregon Rule of Evidence 311 presumes that a defendant is competent. The district court ruled that his due process claim (that he was tried while incompetent) was procedurally defaulted because it was not included in his petition for review to the Oregon Supreme Court. The district court rejected Lounsbury's assertion that the question of his fitness to stand trial was a "necessary corollary" to the burden of proof issue that he raised in his state court petition for review.

Lounsbury appealed.

[1] The question was whether Lounsbury's state court petition for review fairly presented his substantive claim that he was tried while mentally incompetent. Competency disputes can give rise to two distinct claims—substantive and procedural—that trigger different analyses under the general heading of due process. The two claims are sufficiently related, however, that exhausting the procedural (burden of proof) claim may also exhaust the substantive claim that the petitioner was tried while incompetent. **[2]** Lounsbury worded his petition for review as a procedural challenge, but the clear implication of his claim was that by following a constitutionally defective procedure, the state court erred in finding him competent. Where the substantive and procedural claims are as intertwined as they were here, it had to be held that Louns-

bury made a fair presentation to the state courts of his claim that he was not competent to stand trial.

[3] To read Lounsbury's petition for review without being aware of the substantive competency claim would be to impute a strategic choice to abandon the substantive claim. **[4]** Such imputation would be inappropriate in light of the dilemma Lounsbury's lawyer faced in framing the issues in the petition for review to the Oregon Supreme Court. **[5]** Oregon attorneys are presented with the dilemma of having to say enough in their petitions for review to exhaust while, if possible, presenting claims not so fact or case-specific that they run afoul of the Oregon Rules of Appellate Procedure. Attorneys in Oregon therefore must strive, if they can, to word their petitions for review in such a way that if review is granted, the Oregon Supreme Court could reach all the issues they endeavor to exhaust, while abiding by the applicable Rule concerning the content of petitions for review.

[6] Against this backdrop, it had to be held that Lounsbury adequately exhausted his substantive competency claim where (1) that claim was closely related to, and concerned the very same trial court legal ruling as, the claim that was concededly adequately raised; (2) the Oregon Supreme Court, under its own rules, could have reached the substantive competency issue had review been granted because it was squarely raised in the state appellate court brief; (3) the text of the petition included the substantive claim; and (4) had the Oregon Supreme Court accepted review even over the procedural issue only, it could have discussed the strength of the substantive competency claim in the course of conducting a harmless error analysis for the procedural competency claim. **[7]** Accordingly, it had to be concluded that the district court erred in deciding that Lounsbury's claim was barred by procedural default. It was presented, and rejected by the state courts.

[8] As to Lounsbury's procedural claim on the allocation of the burden of proof, the state trial court reasonably applied federal law. The district court did not err in ruling that the state court gave Lounsbury a full opportunity to show that he was incompetent. **[9]** Because the error in declaring a procedural default kept the district court from deciding Lounsbury's substantive competency claim, however, its judgment had to be reversed and the case remanded to the district court to give it the opportunity to decide whether the state court denied Lounsbury due process in finding him competent to stand trial.

COUNSEL

Christopher Schatz, Assistant Federal Public Defender, Portland, Oregon, for the petitioner-appellant.

Timothy Sylwester, Assistant Attorney General, Salem, Oregon, for the respondent-appellee.

OPINION

GOODWIN, Circuit Judge:

Michael Lounsbury appeals the denial of his habeas petition, which alleges substantive and procedural errors affecting the determination of his competency to stand trial.

BACKGROUND

In December 1991, Lounsbury was indicted on 11 counts of aggravated murder for killing Adrienne Thomas in Portland, Oregon. The state trial court held three hearings to determine whether Lounsbury was mentally fit to stand trial.

Under Oregon law, if a court "has reason to doubt the defendant's fitness to proceed by reason of incapacity," the court may order an examination by a psychiatrist or a psy-

chologist, and may commit the defendant to a state mental hospital for a competency evaluation. Or. Rev. Stat. § 161.365. "Incapacity" may be found if, as a result of mental disease or defect, the defendant is unable:

> (a) To understand the nature of the proceedings against the defendant; or
>
> (b) To assist and cooperate with the counsel of the defendant; or
>
> (c) To participate in the defense of the defendant.

Or. Rev. Stat. § 161.360(2).

At the first hearing, the defense presented two mental health experts whose opinions left the court in doubt. Following the recommendation of one of the experts, the court deferred determination of Lounsbury's competency in order to ascertain whether anti-psychotic medication would improve Lounsbury's ability to assist in his own defense. At a second hearing, on September 9, 1992, the state attempted to show that Lounsbury was malingering. The prosecutor called two police officers and a fellow inmate who had observed Lounsbury's behavior before and after the date of the crime. The defense recalled its two experts. One of the experts testified that Lounsbury understood the role of the judge and the attorneys, as well as court procedures and the charges against him, but he nonetheless was unable to aid and assist in a "meaningful" way. The other expert, Dr. Edward Colbach, was more equivocal — he stated that he was "not comfortable saying that [Lounsbury was] competent to stand trial" — and admitted that this tentative conclusion was influenced by his belief in the honesty of Lounsbury's attorneys. The court was still unsatisfied, and committed Lounsbury to the Oregon State Mental Hospital (OSMH) for a competency evaluation.

Lounsbury was institutionalized from September 14 to October 27, 1992.

At the final competency hearing, on February 5, 1993, the court heard from Dr. Richard Hulteng of the OSMH, who stated that in his opinion, Lounsbury was probably malingering, and in any case, was competent to stand trial. He also testified that the symptoms reported by the defense experts lessened or disappeared in the course of Lounsbury's stay at the OSMH. At this hearing, the state also argued that the burden of proof to show incompetency lay with the defense because Oregon Rule of Evidence 311 presumes that a defendant is competent. The court rejected the state's assertion on "the order of proof" but without deciding that question, ruled that Lounsbury was competent and set the case for trial.

The jury convicted Lounsbury in March 1993, rejecting his insanity defense. He appealed his conviction to the Oregon Court of Appeals. His appeal included an assertion that the trial court erred in failing to articulate the proper burden of proof in his competency hearing and in determining that he was competent to stand trial. The Oregon Court of Appeals affirmed without opinion.

In his petition to the Oregon Supreme Court, Lounsbury again raised the issue whether the convicting court correctly dealt with the burden of proof, along with a general challenge to the pretrial finding that he was competent to proceed to trial. The Oregon Supreme Court denied review.

After making his way through state post-conviction proceedings,[1] Lounsbury raised the following federal claim in district court:

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[1] The Circuit Court of Oregon, Marion County, found that Lounsbury challenged the constitutionality of the competency determination on direct appeal but held that "[t]hose issues which

> Petitioner was denied due process of law and equal protection of law as guaranteed under Amendments V and XIV to the United States Constitution.

Lounsbury divided his federal claim into two parts: (1) that he was tried when he was not mentally competent, and (2) that the state courts had denied him due process by ignoring his burden of proof argument. The district court held that his due process claim (that he was tried while incompetent) was procedurally defaulted because it was not included in his petition for review to the Oregon Supreme Court.

Relying in part on *Peterson v. Lampert*, 277 F.3d 1073, 1074 (9th Cir. 2002), *vacated by* 295 F.3d 933 (2003), the district court rejected Lounsbury's assertion that the question of his fitness to stand trial was a "necessary corollary" to the burden of proof issue that he raised in his state court petition for review. This ruling presents the primary question in this appeal.

PROCEDURAL DEFAULT

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal habeas relief to a state prisoner is not available unless the state court decision: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The AEDPA requires federal courts to accord considerable defer-

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were...raised on direct appeal cannot be grounds for post-conviction relief." The state appellate court affirmed this order without opinion, and the Oregon Supreme Court again denied review.

ence to a state court's adjudication of federal issues. However, where, as here, the state courts' decisions are rendered without providing a rationale, we must undertake an independent review of the record. *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000).

To obtain federal habeas relief, a state petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b)(1); *Peterson v. Lampert*, 319 F.3d 1153, 1155 (9th Cir. 2003) (en banc). A petitioner is deemed to have exhausted state remedies if he makes a fair presentation of his federal claims to the state courts. *Peterson*, 319 F.3d at 1155-56. Fair presentation requires that a state's highest court has "a fair opportunity to consider [an appellant's constitutional claim] and to correct that asserted constitutional defect." *Picard v. Connor*, 404 U.S. 270, 276 (1971); *see also Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (requiring that petitioner "alert" the state courts of the constitutional issues that are on appeal). A procedural default occurs when a post-conviction petitioner fails to make the substance of his claim known to the state court and can no longer raise them through any state procedure.

[1] In this case, the question is whether Lounsbury's state court petition for review fairly presented his substantive claim that he was tried while mentally incompetent. Competency disputes can give rise to two distinct claims — substantive and procedural — that trigger different analyses under the general heading of due process. *See Williams v. Woodford*, 306 F.3d 665, 704-05 (9th Cir. 2002); *see also Walton v. Angelone*, 321 F.3d 442, 459 (4th Cir. 2003) ("Competency claims can raise issues of both procedural and substantive due process."). The two claims are sufficiently related, however, that exhausting the procedural (burden of proof) claim may also exhaust the substantive claim that the petitioner was tried while incompetent.

[2] Lounsbury worded his petition for review as a procedural challenge, but the clear implication of his claim was that by following a constitutionally defective procedure, the state court erred in finding him competent. Where the substantive and procedural claims are as intertwined as they are here, we hold that Lounsbury made a fair presentation to the state courts of his claim that he was not competent to stand trial. *Cf. Wells v. Maas*, 28 F.3d 1005, 1008 (9th Cir. 1994) (concluding that, read in context, Wells' claim that his guilty plea was involuntarily made put state court on notice of his ineffectiveness of counsel claim).

The distinction between Lounsbury's petition in this case and the clear default in *Peterson v. Lampert* is that the petitioner in *Peterson* specifically limited the issue on state habeas review to a state constitutional question on "inadequate" assistance of counsel, citing to Oregon case law only. 319 F.3d at 1155. We held there that the "clear language" and "explicit qualification" contained in his petition for review indicated that Peterson "made a deliberate, strategic choice not to present the federal issue in his petition." *Id.* at 1159.

[3] Lounsbury's petition, on the other hand, included no such qualification, and unquestionably alleged a due process violation under the federal constitution. His petition stated: "[D]efense counsel below argued that [Lounsbury] was not able to aid and assist. He clearly suffered from a mental condition." To read Lounsbury's petition for review without being aware of the substantive competency claim would be to impute a strategic choice to abandon the substantive claim.

[4] Such imputation would be inappropriate in light of the dilemma Lounsbury's lawyer faced in framing the issues in the petition for review to the Oregon Supreme Court. Criminal defense attorneys in Oregon are required to conform their arguments to two demands that are in some tension with each other: the Supreme Court's pronouncement in *O'Sullivan v.*

Boerckel, 526 U.S. 838, 846-48 (1999), that criminal defendants must seek discretionary review of all claims in order to meet the § 2254 exhaustion requirement, and Oregon's Rules of Appellate Procedure, which require that each petition for review "shall" contain a statement concerning why the petition raises issues which "have importance beyond the particular case." Or. R. App. Proc. 9.05(7)(f) (2004);[2] *see also* Or. R. App. Proc. 9.07 (2004) ("Criteria for Granting Discretionary Review"); *Baldwin v. Reese*, 124 S. Ct. 1347, 1350 (2004) (noting that the Oregon rules require litigants seeking discretionary review to explain why the questions presented have special importance). The Oregon Rules further expressly state that this requirement cannot be fulfilled by merely including "[a]n assertion of the grounds on which the decision of the Court of Appeals is claimed to be wrong, without more." Or. R. App. Proc. 9.05 (8) (2004).[3] Additionally, the Supreme

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[2] In some cases, the quoted sections of Oregon's Rules of Appellate Procedure were numbered differently when Lounsbury submitted his petition to the Oregon Supreme Court in 1995. However, the relevant content has remained unchanged in each instance. *See* Or. R. App. Proc. 9.05(3)(f) (1994) for the version of Rule 9.05(7)(f) that applied in 1995.

[3] This aspect of the Oregon Rules of Appellate Procedure is different from the state law rule discussed in *O'Sullivan*, in which the rule endeavored merely to provide guidance on what cases would be suitable for discretionary review. *See O'Sullivan*, 526 U.S. at 843, 845-47. Here, although Rule 9.07 provides similar non-binding guidance, Rule 9.05(7)(f) & (8) make clear that a petition for review *must* contain a statement that the issues raised have "special importance beyond the particular case" and a mere assertion of error is insufficient to merit review. *See* Or. R. App. Proc. 9.05(4) (1994) for the 1995 version. The reason is that under § 2254(c) and

Court of Oregon has expressed its frustration with the practice of raising claims in a petition for review merely to exhaust remedies for federal habeas corpus purposes, stating that the practice leads to a "useless expenditure of the resources of the people of Oregon." *State of Oregon v. Nail*, 745 P.2d 415, 416 (Or. 1987) (en banc).

[5] Oregon attorneys are thus presented with the dilemma of having to say enough in their petitions for review to exhaust under *O'Sullivan* while, if possible, presenting claims not so fact or case-specific that they run afoul of the Oregon Rules of Appellate Procedure. Under Rule 9.05(7)(f) & (8), it appears that a claim that the Court of Appeals erred in a case-specific way could not properly be expressly raised in a petition for review. Attorneys in Oregon therefore must strive, if they can, to word their petitions for review in such a way that *if* review is granted, the Oregon Supreme Court could reach all the issues they endeavor to exhaust, while abiding by the applicable Rule concerning the content of petitions for review. *Cf* Or. R. App. Proc. 9.20 (2004) (providing that the Supreme Court may, but need not, consider any issue raised in the petition for review *or* before the Court of Appeals). *Baldwin* was particularly sensitive to the need to adopt federal exhaustion criteria that do not require state appellate judges to "alter their ordinary review practices." 124 S. Ct. at 1350.

[6] Against this backdrop, we hold that Lounsbury adequately exhausted his substantive competency claim where (1) that claim was closely related to, and concerned the very same trial court legal ruling as, the claim that was concededly

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O'Sullivan, one *could* view discretionary relief as simply unavailable in Oregon for fact-based claims, in light of the rules the opinion cites. *See O'Sullivan*, 526 U.S. at 847-48 (noting that § 2554(c) requires exhaustion only of available state remedies).

adequately raised; (2) the Oregon Supreme Court, under its own rules, could have reached the substantive competency issue had review been granted because it was squarely raised in the Court of Appeals brief; (3) the text of the petition includes the substantive claim; and (4) had the Oregon Supreme Court accepted review even over the procedural issue only, it could have discussed the strength of the substantive competency claim in the course of conducting a harmless error analysis for the procedural competency claim.

[7] Accordingly, we conclude that the district court erred in deciding that Lounsbury's claim was barred by procedural default. It was presented, and rejected by the state courts. We express no opinion on the merits of this claim because it was not reached by the district court. We hold only that it was not procedurally defaulted.

BURDEN OF PROOF

[8] As to Lounsbury's procedural claim on the allocation of the burden of proof, we agree with the district court that the state trial court reasonably applied federal law. *See Medina v. California*, 505 U.S. 437, 451 (1992) (holding that the state need not assume the burden of proof and that "it is enough that the State affords the criminal defendant...a reasonable opportunity to demonstrate that he is not competent to stand trial."). The district court did not err in holding that the state court gave Lounsbury a full opportunity to show that he was incompetent.

[9] Because the error in declaring a procedural default kept the district court from deciding Lounsbury's substantive competency claim, however, we remand this case to the district court to give it the opportunity to decide whether the state court denied Lounsbury due process in finding him competent to stand trial.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MICHAEL LOUNSBURY,

Petitioner,

v.

S. FRANK THOMPSON, Superintendent, Oregon State Penitentiary,

Respondent.

Civil No. 99-1135-CO

ORDER

Magistrate Judge John P. Cooney filed Finding and Recommendation on May 7, 2002, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636 (b) (1) (B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate judge's report. See 28 U.S.C. § 636 (b) (1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Petitioner has timely filed objections. I have, therefore, given de novo review of Magistrate Judge Cooney's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Cooney's Findings and Recommendation filed May 7, 2002, in its entirety. Respondent's motion to deny habeas corpus relief is granted, and the petition for writ of habeas corpus is dismissed.

IT IS SO ORDERED.

DATED this 24th day of July, 2002.

/s/ Michael R. Hogan
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MICHAEL LOUNSBURY,

Petitioner,

v.

S. FRANK THOMPSON, Superintendent, Oregon State Penitentiary,

Respondent.

Civil No. 99-1135-CO

FINDINGS AND RECOMMENDATION

COONEY, Magistrate Judge:

Petitioner brings this habeas corpus proceeding pursuant to 28 U.S.C. section 2254. In his petition for habeas corpus relief, petitioner raises claims based upon ineffective assistance of trial counsel, and a claim for violation of due process and equal protection by the trial court. Respondent moves to deny habeas corpus relief on the grounds that petitioner has procedurally defaulted two claims, the state courts' decisions denying relief on all grounds are entitled to deference, and petitioner's claims are without merit.

I. BACKGROUND

Following trial by jury, petitioner was found guilty of eleven counts of aggravated murder, in Multnomah County, Case No. C9112-36586. (Ex. 101.) The counts were merged into two counts of aggravated murder, and petitioner was sentenced in April 1993 to two consecutive life terms without parole. (Ex. 101.)

Petitioner directly appealed to the Oregon Court of Appeals, but the Oregon Court of Appeals affirmed without

opinion, State v. Lounsbury, 132 Or. App. 232 (1994). (Ex. 108.) The Oregon Supreme Court denied review, State v. Lounsbury, 320 Or. 569 (1995). (Ex. 107.)

Petitioner filed for post-conviction relief in Marion County, Lounsbury v. Thompson, Case No. 96-C-10975. (Ex. 109.) The court denied relief. (Exs. 122-124) Petitioner appealed the denial of post-conviction relief to the Oregon Court of Appeals. The Oregon Court of Appeals affirmed without opinion, Lounsbury v. Thompson, 157 Or. App. 397 (1998) (Ex. 128), and the Oregon Supreme Court denied review, Lounsbury v. Thompson, 328 Or. 594 (1999).

II. DISCUSSION

In his petition for habeas corpus relief, petitioner raises the following claims for relief:

> A. Ground One: Petitioner was denied the assistance of counsel in pre-trial proceedings in violation of rights to counsel under amendments V, VI, and XIV to the United States constitution.
>
> Supporting Facts: [] Trial counsel rendered ineffective and inadequate assistance of counsel by failing to effectively pursue a Motion to Suppress or otherwise exclude, or litigate the admissibility of electronically intercepted communications, to-wit: body wire tapes.
>
> B. Ground Two: Petitioner was denied the assistance of counsel in trial proceedings in violation of his rights to counsel under amendments V, VI, XIV to the United States Constitution.

> Supporting Facts: [] Trial counsel rendered ineffective and inadequate assistance of counsel by:

C. Failing to object, or move for a mistrial in response to, testimony elicited by the prosecution in front of the jury as to what the effect of a verdict of guilty except for insanity would have on Petitioner and his likelihood for future release;

> a. Failed to conduct adequate investigation into the facts and circumstances surrounding the charges in this case. To-wit: Failing to pursue DNA evidence or the lack thereof, as a means of attacking whether bone fragments did or did not belong to the purported victim in this case.
>
> b. Ground Three: Petitioner was denied due process of law and equal protection of the laws as guaranteed under Amendments V and XIV to the United States Constitution.

Supporting Facts: []

> a. The trail court required [Petitioner] to go forward to trial even though Petitioner's trial counsel told the Court that he was not able to aid and assist in his own defense.
>
> b. The court applied a standardless test, including no identifiable burden of proof, in making its determination as to Petitioner's fitness to proceed.

(Pet.)

Respondent argues that petitioner has procedurally defaulted claims one and three; the state courts' decisions denying relief on all grounds are entitled to deference; and plaintiff's claims are without merit. Petitioner argues that his due

process claims concerning error in the determination of competency are not procedurally defaulted. Petitioner requests an evidentiary hearing on the issue of whether a retrospective competency decision can be made. Petitioner's claims of ineffective assistance of counsel are submitted to the court without briefing. (See Pet'r Traverse at 10 n.3.) Respondent replies that at least one of petitioner's claims in Ground Three is procedurally defaulted; the trial court's determinations are entitled to deference; and petitioner is not entitled to an evidentiary hearing.

Procedural Default

Procedural default remains a viable defense under the Anti-Terrorism and Effective Death Penalty Act of 1996. Whaley v. Thompson, 22 F. Supp.2d 1146, 1156 (D. Or. 1998). The requirement that state remedies be exhausted is satisfied when the petitioner has fairly presented the substance of the federal claim to the state courts. This means that the state court must be provided with a "'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim. It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6 (1982). State courts must be alerted to the fact that a prisoner is asserting a claim under the United States Constitution. The "mere similarity of claims is insufficient to exhaust." Duncan v. Henry, 513 U.S. 364, 365-66, reh'g denied, 514 U.S. 1032 (1995); Picard v. Conner, 404 U.S. 270, 276 (1971). The Ninth Circuit has found that, under Duncan, "general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion." Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999), cert. denied, 529 U.S. 1009 (2000) (citing Gray v. Netherland, 518 U.S. 152, 162-63, reh'g denied, 518 U.S. 1047 (1996)); Shumway v.

Payne, 223 F.3d 982, 987 (9th Cir. 2000). In the Ninth Circuit, a petitioner seeking habeas corpus relief under 28 U.S.C. section 2254 exhausts available state remedies "only if he characterized the claims he raised in state proceedings *specifically* as federal claims"; that is, "the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law." Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir. 2000), as amended, 247 F.3d 904 (9th Cir. 2001) (italics in original, footnote omitted); see Peterson v. Lampert 277 F.3d 1073, 1074 (9th Cir. 2002) [concluding that "Presenting a similar state law claim and citing state cases, even if they apply federal law, does not preserve the federal issue," thus, closing the door left open in Lyons]. A habeas petitioner's claim has been exhausted if the claim has been fairly presented to the highest state court with jurisdiction to consider the claim, and no state remedy remains available. Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A claim is not fairly presented if it is raised in a "procedural context in which its merits will not be considered." Castille v. Peoples, 489 U.S. 346, 351-52, reh'g denied, 490 U.S. 1076 (1989).

A procedural default occurs when a petitioner violates a state procedural rule which would constitute adequate and independent state grounds to bar review in the United States Supreme Court. Coleman v. Thompson, 501 U.S. 722, 729-32, reh'g denied, 501 U.S. 1277 (1991); Wells v. Maass, 28 F.3d 1005, 1008-11 (9th Cir. 1994). The failure to present a claim which would be procedurally barred in state court fulfills the technical requirement of exhaustion of state remedies. Coleman, 501 U.S at 732, 735 n.1.

A federal court will not consider a claim that has been procedurally defaulted unless petitioner shows both "cause" and "prejudice" for the default, or demonstrates that the failure to consider the claim will result in a fundamental miscar-

riage of justice. Wainwright v. Sykes, 433 U.S. 72, 90-91, reh'g denied, 434 U.S. 880 (1977); Coleman, 501 U.S. at 749. "Cause" is a legitimate excuse for the default due to something external to the prisoner. Coleman, 501 U.S. at 753. "Prejudice" is "actual harm resulting from the alleged constitutional violation." Thomas v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991). "A fundamental miscarriage of justice occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent." Boyd v. Thompson, 147 F.3d 1124, 1127 (9th Cir. 1998) (internal quotations omitted).

Respondent contends that Ground One is procedurally defaulted. In his petition for post-conviction relief, petitioner contended that counsel was ineffective for failing to pursue a motion to suppress or otherwise the admissibility of body wire tapes. (Ex. 109.) However, this question was not raised on appeal from the post-conviction judgment. (Exs. 125, 127) The court finds that petitioner has procedurally defaulted Ground One relating to ineffectiveness of trial counsel for failing to litigate the admissibility of body wire tapes.

Respondent contends that at least one claim of Ground Three is procedurally defaulted. In his reply, respondent withdraws his argument made in his motion to dismiss that both claims in Ground Three are procedurally defaulted, and argues that petitioner's claim in Ground Three concerning his fitness to proceed to trail is procedurally defaulted. Petitioner contends that his claims in Ground Three of constitutionally significant error with respect to the state court's failure to articulate and employ an appropriate standard of burden of proof, and its determination that he was competent to proceed have been fairly presented to the state courts. He asserts that in his petition for review, he challenged the trial court's decision finding him competent since his position on this point is a necessary corollary to his contention regarding the constitu-

tional inadequacy of the competency determination having been made absent any articulated standard or burden of proof, citing Wells v. Maas, 28 F.3d 1005, 1009 (9th Cir. 1994). Petitioner further argues that he clearly called the attention of the state appellate courts to the argument and law contained in the trial memorandum attached to his briefs and, therefore, he fairly presented both his procedural and substantive competency claims for decision.[1]

The record shows that, on direct appeal, petitioner raised the questions of burden of proof and fitness to proceed as federal claims in his brief and by reference to a memorandum on competency attached. (Ex. 102.) In his petition of review to the Oregon Supreme Court, however, petitioner raised only the question of burden of proof and, in the argument, referenced page 4 of the trial memorandum attached, which discusses only the burden of proof issue. (Ex. 106.) The court rejects petitioner's implication that, because the question of unfitness to proceed was raised in the court of appeals, it is raised in the supreme court since that court has the power to review claims not raised in the petition. The Ninth Circuit reconsidered Wells v. Maas, 28 F.3d 1005 (9th Cir. 1994), in Peterson v. Lampert, 277 F.3d 1073, 1074 (9th Cir. 2002), and determined that "A petitioner's failure to present an issue in

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[1] In the section of his brief addressing the merits of his due process claim relating to his substantive claim of competency to stand trial, petitioner states: "A subjective [sic] competency claim is not subject to procedural bar," citing an out-of-circuit case. Respondent does not address this contention in his reply. To the extent petitioner contends that procedural default does not apply to claims of mental incompetence, the Ninth Circuit has held that claims of mental incompetence can be procedurally defaulted. Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306-07 (9th Cir.), cert. denied, 519 U.S. 1030 (1996).

his petition for review to the Oregon Supreme Court constitutes a procedural default of the issue." The court held that to preserve a federal claim, petitioner must "either raise it explicitly or, under Wells, [] incorporate it from his brief before the court of appeals into his petition for review." Id. at 1079-80. That was not done by petitioner here. In his petition for post-conviction relief, petitioner raised both issues. (Ex. 109.) However, on appeal from the post-conviction judgment, petitioner did not raise either issue, and he does not argue otherwise. (Exs.125,127.) Accordingly, the court finds that petitioner has procedurally defaulted Ground Three subpart a, relating to his fitness to proceed to trial.

Petitioner may no longer seek relief on the defaulted claims in the state courts. Petitioner offers no cause as to why these claims were not timely raised in the state court. See Coleman, 501 U.S. at 749. The court finds that petitioner has procedurally defaulted, without excuse, Ground One concerning counsel's failure to litigate the admissibility of body wire tapes and Ground Three subpart a, concerning his fitness to proceed to trial. Habeas corpus relief should be denied on these grounds based upon procedural default. The court will address petitioner's claims contained in Ground Two concerning ineffective assistance of counsel, and Ground Three subpart b, concerning the burden of proof used by the trial court in making its determination as to petitioner's fitness to proceed to trial.

Petitioner's non-defaulted claims

Because the petition in this case was filed after April 26, 1996, the previsions of the Antiterrorism and Effective Death Penalty Act (AEDPA) govern this case. Lindh v. Murphy, 521 U.S. 320, 322, 336 (1997). The AEDPA revised the standards of deference federal courts must accord state court decisions. The new standards, contained in 28 U.S.C. Section 2254, provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

Further, any factual determinations made by the state courts are presumed to be correct. Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Section 2254(e)(1) provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Under section 2554(d)(1), a state prisoner may obtain federal habeas corpus relief with respect to a claim adjudicated on the merits in state court only if the state court's ruling was either (1) contrary to clearly established federal law, as determined by the Supreme Court of the United States, or (2)

involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1519 (2000); Van Tran v. Lindsey, 212 F.3d 1143, 1149 (9th Cir.), cert. denied, 531 U.S. 944 (2000). These clauses have independent meanings, but in some cases they may overlap. Williams, 120 S. Ct. at 1519, 1521; Van Tran, 212 F.3d at 1150.

"The threshold question under AEDPA is whether [petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." Williams, 120 S. Ct. at 1511. When determining what the clearly established federal law is, federal courts look at the holdings of the United States Supreme Court as of the time of the state court's decision. Id. at 1523. Ninth Circuit law may still be considered "for its persuasive authority in applying Supreme Court law." Van Tran, 212 F.3d at 1154.

A state court's decision is "contrary to" clearly established Supreme Court precedent if 1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or 2) the state court "confronts a set of facts that are materially indistinguishable" from a Supreme Court case, but still reaches a different result. Williams, 120 S. Ct. at 1519-20, 1523; Van Tran, 212 F.3d at 1150. A state court's ruling is " contrary to: Supreme Court precedent if it is diametrically different, opposite in character or nature, or mutually opposed to, a Supreme Court holding. Williams, 120 S. Ct. at 1519.

A state court decision involves an "unreasonable application" of Supreme Court precedent if 1) the state court identifies the correct governing rule, but then applies it to a new set of facts in an unreasonable way, or 2) the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or un-

reasonably refuses to extend that principle to a new context where it should apply. Id. at 1520-21; Van Tran, 212 F.3d at 1150. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable....[A]n *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law." Williams, 120 S. Ct. at 1521-22. Thus, a federal court may not issue a writ even when it concludes, based on its independent judgment, that the state court, in reaching its decision, applied clearly established federal law erroneously or incorrectly. Id. at 1522-23.

The Ninth Circuit, in determining when a state court has applied clearly established Supreme Court precedent in an objectively unreasonable manner, employs the doctrine of "clear error." Van Tran, 212 F.3d at 1152. The "clear error" doctrine allows for reversal of a decision only when the reviewing court "is left with a 'definite and firm conviction' that an error has been committed." Id. at 1153; Fisher v. Roe, 263 F.3d 906, 915 (9th Cir. 2001). A federal court

> must reverse a state court's decision as involving an "unreasonable application" of clearly established federal law when [the federal court's] independent review of the legal question does not merely allow [the federal court] ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rather leaves [the federal court] with a "firm conviction" that one answer, the one rejected be the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous–in other words that clear error occurred.

Id.

Under Ninth Circuit precedent, "when analyzing a claim that there has been an unreasonable application of federal law, we must first consider whether the state court erred; only after we have made that determination may we then consider whether any error involved an unreasonable application of controlling law within the meaning of § 2254(d)." Id. at 1155. When an issue is "too close," the habeas court will not find that the state court's decision involved an unreasonable application of clearly established federal law. See id. at 1159.

And under section 2254(d)(2), a state prisoner may obtain federal habeas corpus relief with respect to a claim adjudicated on the merits in state court only if the state court's decision was based on a unreasonable determination of the facts in light of the evidence presented in the state court proceeding. In making this determination, the habeas court employs the same standard of unreasonableness that applies to a claim under section 2254(d)(1). Torres v. Prunty, 223 F.3d 1103, 1107-08 (9th Cir. 2000); see Green v. White, 232 F.3d 671, 672, (9th Cir. 2000). Thus, the court requires "'more than mere incorrectness,' such that the state court's fact finding is so 'clearly erroneous' as to leave [the court] with a 'firm conviction' that its determination was mistaken on the evidence before it." Gunn v. Ignacio, 263 F.3d 965, 969, 971 (9th Cir. 2001) (quoting Torres v. Prunty, 223 F.3d 1103, 1107-08 (9th Cir. 2000)). In cases where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. Cree v. Flores, 157 F.3d 762, 768 (9th Cir. 1998).

In this case, petitioner argues that the deference standards do no apply to the state courts' decisions in this case and that the court is required to perform an independent review to ensure meaningful application of section 2254(d)(1). He contends that the state courts failed to provide a clear statement

of the basis for its decisions, citing Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000), and Delgado v. Lewis, 181 F.3d 1087 (9th Cir. 1999), vacated, 528 U.S. 1133 (2000). Petitioner argues that deference is required where the state court memorializes the bases of its conclusions and clearly describes the federal standards used and steps employed in applying those standards to the facts. Petitioner contends that, on direct appeal, neither the Oregon Court of Appeals nor the Oregon Supreme Court issued an opinion setting forth a rationale for rejecting his claims of error. He contends that, although the state post-conviction court issued findings of fact and conclusions of law, such findings were drafted by an interested party, and the findings failed to advance any legal reasoning for the post-conviction court's rejection of his contentions of error relating to the determination that he was competent.[2]

In determining whether the deferential standards of the AEDPA apply to petitioner's claims, four prerequisites must be met: "A claim must be (1) adjudicated (2) on the merits (3) in a state court proceeding (4) that resulted in a decision." Greene v. Lambert, ___F.3d___, No. 01-35595, 2002 WL 453215, at *4, *6 (9th Cir. Mar. 26, 2002)(citing Harris v. Superior Court, 500 F.2d 1124, 1128-29 (9th Cir. 1974), cert. denied, 420 U.S. 973 (1975) (en banc)[state supreme court's "bare postcard denial" construed as decision on merits]). It is the decision of the highest state court which is accorded deference. Gunn v. Ignacio, F.3d 965, 969 (9th Cir. 2001);

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[2] The court notes that the issue of burden of proof relating to the state court's determination that he was competent to proceed was raised through appellate review on direct appeal, and was also raised in his petition for post-conviction relief, but the issue was not raised through appellate review of the post-conviction court judgment.

Delgado v. Lewis, 223 F.3d 976, 979 (9th Cir. 2000); see Greene, ___F.3d at ___, 2002 WL 453215, at *5. Here, the Oregon Supreme Court denied review of petitioner's federal claims without any reasoned explanation for its decisions, on petitioner's direct appeal which raised the issue of the burden of proof to be used in determining competency, and on appeal from the post-conviction judgment which raised two claims of ineffectiveness of trial counsel. When the state court does not give reasoning for its decision, the court must conduct an independent review of the complete record and applicable law. Such independent review is not de novo review, but is required to determine whether the state court clearly erred in its application of controlling federal law. Delgado, 223 F.3d at 981-82; Greene, ___F.3d at ___, 2002 WL 453215, at *5-*6; Fisher v. Roe, 263 F.3d 906, 914 (9th Cir. 2001). "Absent clear error, the deference [owed] state court decisions dictates a denial of habeas relief, even when [the habeas court] conclude[s] that a legal error has been committed." Delgado, 223 F.3d at 981. An independent review of the record is the only means for the court to determine whether the state court's decision was objectively reasonable. Id. at 982; Greene, ___F.3d at ___, 2002 WL 453215, at *5. Further, when the court's independent review of the record demonstrates that the findings are supported by the record, the fact that the state post-conviction court had the state draft the findings and conclusions does not preclude the habeas court from affording the findings deference. Correll v. Thompson, 63 F.3d 1279, 1293 n.11 (4th Cir. 1995), cert. denied, 516 U.S. 1035 (1996).

Accordingly, the court will conduct an independent review of the record before it to determine whether the state courts' decisions were objectively unreasonable.

Petitioner does not challenge the state courts' findings of fact and, therefore, the factual findings of the state courts are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner contends

in his traverse that the state courts' decision finding petitioner was competent to proceed, without a clearly established and articulated burden of proof prior to decision, is an unreasonable application of clearly established federal law.

Ground Two - Ineffective assistance of trial counsel

Petitioner claims that his trial counsel provided ineffective assistance by:

1) failing to object or move for a mistrial, in response to testimony elicited in front of the jury by the prosecution as to what the effect of a verdict of guilty except for insanity would have on petitioner and his likelihood for future release; and 2) failing to conduct adequate investigation into the facts and circumstances surrounding the charges in this case, that is, by failing to pursue DNA evidence or the lack thereof, as a means of attacking whether bone fragments did or did not belong to the purported victim. Respondent contends that the findings of fact by the post-conviction court are entitled to deference under 28 U.S.C. section 2254(e). He contends that the findings and conclusions of the post-convictions court were a clear and proper application of Strickland v. Washington, 466 U.S. 668 (1984), and, based on the evidence presented, was not objectively unreasonable. Petitioner submits this ground for habeas relief without briefing.

The clearly established federal law governing ineffective assistance of counsel claims at the time the state court made its decision was set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984). Since both petitioner and respondent relied on Strickland in their post-conviction memorandums, it seems clear that the post-conviction court, in making its decision on petitioner's claims of ineffective assistance of counsel applied the standards set forth in Strickland. The post-conviction court specifically adopted respondent's arguments made in his

trial memorandum as its findings and conclusions. On appeal from the post-conviction judgment, petitioner relied on Strickland in the court of appeals and in his petition for review by the Oregon Supreme Court; respondent did not cite any federal cases in the court of appeals. The court finds that the state courts applied the proper Supreme Court precedent to petitioner's claims. Therefore, this court must determine if the state courts' denial of relief involved an unreasonable application of these clearly established Supreme Court precedents or if the state court's treatment of petitioner's claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Under clearly established Supreme Court law, to prevail on a claim of ineffective assistance of counsel, petitioner must satisfy a two-part test: petitioner must show both that trial counsel's performance fell outside the wide range of reasonable professional assistance, and that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. A petitioner must identify the acts or omissions of counsel that petitioner alleges were not the result of reasonable professional judgment. Id. at 690. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. Id. The reasonableness of counsel's performance must be judged on the facts of the particular case and viewed at the time of counsel's conduct. Id.

If counsel's performance is found to be deficient, any deficiencies must be prejudicial to the defense in order to constitute ineffective assistance of counsel. Id. at 691. Petitioner must demonstrate that there is "a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The court need not address both components of the ineffective assistance of counsel inquiry if petitioner's showing on one component is insufficient. Id. at 697. In particular, the court may dispose of an ineffectiveness claim on the ground of lack of prejudice alone. Id. The ultimate focus of the inquiry for the court is, "whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id. at 696.

In denying relief on petitioner's claims, the state post-conviction court found in its letter ruling in relevant part that petitioner had not sustained his burden of proof on any of his claims, and that representation by counsel was reasonable and effective in all respects. The post-conviction court adopted the arguments set forth in respondents trial memorandum as its findings and conclusions. (Ex. 122.) In its Findings of Fact and Conclusions of Law, the state post-conviction court made the following relevant findings of fact:

> 7. Petitioner failed to meet his burden of proof in this proceeding to demonstrate that had counsel objected or moved for mistrial when a witness recounted petitioner's belief about the consequences of being found guilty but insane, more probably than not the objection would have been sustained or a mistrial granted, and the results of petitioner's trial would have been different.
>
> 8. Petitioner failed to meet his burden of proof in this proceeding to demonstrate that

trial counsel's lack of objection to the testimony concerning petitioner's belief about the consequences of being found guilty but insane was not a reasonable tactical decision on trial counsel's behalf.

9. The testimony presented through witness Thompson about petitioner's belief of what the result of being found guilty but for insanity would be was offered to rebut petitioner's defense at trial that he was insane at the time he committed the homicide.

10. The testimony from witness Thompson about petitioner's belief about the consequences of being found guilty but insane was offered to demonstrate petitioner's motive for faking mental illness and not for the truth of the mater asserted.

11. Petitioner failed to meet his burden of proof in this proceeding to demonstrate that he suffered prejudice because of counsel's failure to object to the testimony recounting petitioner's belief of what the consequences of being found guilty but insane were.

12. Petitioner failed to meet his burden of proof in this proceeding to demonstrate that trial counsel's investigation was inadequate.

13. Trial counsel obtained an independent defense evaluation of the DNA testing and results of that testing which had been performed for the prosecution.

(Ex. 123.) Based upon these facts, the state post-conviction court concluded that petitioner received adequate assistance

of trial counsel as guaranteed by the United States Constitution. (Ex. 123.) The court has found that the state post-conviction court's facts are entitled to a presumption of correctness under section 2254(e)(1).

The evidence in the record supports the findings of fact by the post-conviction court. Included as an exhibit was the trial transcript, which set forth the testimony of Davis Thompson, who testified about petitioner's thoughts on the possible benefit of an insanity defense and possible consequences to him. (Exs. 113, 121 at 4; see Ex. 112 at 8-10.) The record included petitioner's deposition testimony, (Exs. 114, 121 at 4), and the affidavit of petitioner's mother, Donna Asbell, (Exs. 110, 121 at 3), in which they discuss the basis of petitioner's claim regarding lack of pursuit of DNA evidence. The record included petitioner's affidavit, in which he discussed the bases of both claims of ineffective assistance of counsel. (Exs. 110, 121 at 3.) The record included the affidavit of Brian Wraxall, chief forensic serologist for SERI laboratory, who conducted DNA testing, and his analytical report, (Exs. 110, 121 at 3); and the post-conviction court heard at the post-conviction trial the testimony of trial counsel, Robert D. Wasson, regarding counsels' investigation and consideration of the possible use of the DNA evidence to petitioner's case, (Ex. 121). The court finds on this record that the post-conviction court's findings were not an unreasonable determination of the facts in light of the evidence before the post-conviction court under section 2254(d)(2).

Petitioner contends his petition that trial counsel was ineffective by failing to object to or move for mistrial when testimony was elicited as to the effect of a verdict of guilty except for insanity on petitioner and his likelihood for future release. Respondent contends that the testimony offered by an inmate, Davis Thompson, was offered by the prosecution to rebut petitioner's assertion that he had a mental disease or defect at

the time of the murder, and that the testimony went to petitioner's motive for asserting an insanity defense, not to the actual consequences of a verdict of guilty except for insanity. Petitioner does not address this ground for relief in his traverse.

At trial, the State called Davis Thompson as a witness. Mr. Thompson, an inmate with petitioner, testified in pertinent part that petitioner looked up the insanity statute in the law library.

He then testified in pertinent part as follows:

> Q Did he tell you how he thought the insanity defense might benefit him in a charge of aggravated murder?
>
> A Well, if he was convicted for insanity, then he wouldn't face the aggravated murder charge and he'd go to the State Hospital for five or six years and instead of going to Death Row in Salem.
>
> Q Did he tell you that's what he thought would happen?
>
> A Yeah.
>
> Q Did he tell you why he thought he'd be discharged from the hospital in four, five, six, or seven years?
>
> A No, he never said specifically why, but, you know, that is the general concensus of opinion for everybody in jail because you have people that are coming there all the time that's been down at the hospital for four, five years.

(Part B, Vol. IV, Tr. at 472.)[3] For the purposes of showing that petitioner was not insane and to show petitioner's motive for asserting an insanity defense, Mr. Thompson's testimony was admissible. It is unlikely that an objection or motion for mistrial would have been sustained by the trail court. Respondent also contends that trial counsel's failure to object was a tactical decision and sound trial strategy because trial counsel attempted to impeach the witness on cross-examination and call into question the state's contention that petitioner was seeking to avoid a lengthy incarceration by malingering. On cross-examination, trial counsel asked Mr. Thompson: "Any of those jailhouse lawyers point out to Michael that the statute doesn't say five or six years for insanity on murder but he could be sentenced there for life on the insanity issue?" to which Mr. Thompson responded, "Not that I'm aware of." (Part B, Vol. IV, Tr. at 480.) Petitioner does not rebut that such questioning was a sound tactical choice in the circumstances.

Moreover, even if trial counsel had objected to this testimony by Mr. Thompson, the trial court was required to instruct the jury on the consequences of a verdict of guilty except by reason of insanity, pursuant to ORS 161.313[4] The trial

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[3] The transcript of Mr. Thompson's testimony was attached as an appendix to respondent's brief in the court of appeals, on petitioner's appeal from the post-conviction judgment. (Ex. 126.)

[4] ORS 161.313 provides that when the issue of insanity is submitted to the jury, the court shall instruct the jury in accordance with ORS 161.327, which provides that the court shall order a person found guilty except for insanity placed under the jurisdiction of the Psychiatric Security Review Board for a period of the maximum sentence; and the court shall determine whether the person should be committed to a state hospital or conditionally released pending any hearing before the board in certain enumerated circumstances.

court did so instruct the jury, without objection by petitioner. (Part F, Vol. XII, Tr. at 2321-23.) Thus, petitioner cannot show that he was prejudiced by counsel's failure to object to the testimony, or move for mistrial, since it is unlikely that the questioning on direct examination would have constituted grounds for a mistrial.

Petitioner made no showing in the state courts and makes no showing in this court that the testimony of Mr. Thompson was inadmissible or that trial counsel's decision was not a reasonable tactical choice; nor does he show that he suffered any prejudice if an objection would have been sustained or a motion for mistrial made.

The record before the state post-conviction court, the court of appeals, and the supreme court, supports the courts' decisions with regard to this ground for habeas relief. Based upon this court's review of the entire record, the state courts' findings of fact and law with regard to petitioner's claim of ineffective assistance of counsel on the ground of counsel's failure to object or move for mistrial when testimony was elicited by the prosecution as to the effect a verdict of guilty except for insanity would have and petitioner's likelihood of future release, were not clearly erroneous. The court finds that, on this record, the state courts' decisions were not contrary to, or involve an unreasonable application of, clearly established federal law. Petitioner is not entitled to relief under 42 U.S.C. section 2254(d)(1), on this ground for relief.

Petitioner contends in his petition that trial counsel was ineffective by failing to conduct adequate investigation by failing to pursue DNA evidence or the lack thereof as a means of attacking whether the bone fragments belonged to the purported victim. Respondent contends that trial counsel undertook independent evaluation of the forensic evidence, but in light of the fact that he was told by the defense expert, Dr. Grimsbo, that the DNA evidence would in all likelihood have

been inculpatory, counsel's decision not to present the evidence was strategic. And because the evidence would have been inculpatory, petitioner cannot show that he was prejudiced. Petitioner does not address this ground for relief in his traverse.

Counsel's failure to conduct a reasonable investigation or make a reasonable decision that makes particular investigations unnecessary can provide a basis for an ineffective assistance of counsel claim. Strickland, 466 U.S. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment." Id. In determining what investigations are reasonable and necessary, it is proper for counsel to consider the defendant's own actions and statements, as well as the informed strategic choices made by the defendant and information supplied by the defendant. Id. The conversations between counsel and the defendant "may be critical to a proper assessment of counsel's investigation decisions…". Id.

Here, at the post-conviction trial, post-conviction counsel called trial counsel, Robert D. Wasson, as a witness. Mr. Wasson testified that he and Ms. Graser were trial counsel for petitioner. He testified that he and Ms. Graser petitioned for and received indigent defense funds to retain Dr. Grimsbo, regarding the DNA evidence. (Ex. 121 at 10.) Mr. Wasson testified:

> A ….
>
> When the State elected not to present their evidence, I conferred with Dr. Grimsbo to see whether or not, in his opinion, we could gain something from that, and what I was informed by Dr. Grimsbo was that the laboratory that tested the DNA from [the victim] Adri[ennne]

Thomas, or whatever remains were found, concluded that there was not sufficient viable DNA for them to call with certainty-that DNA samples that they had were deteriorated to an extent that they would not say with certainty if these matched those from Ms. Adri[enne] Thomas's sample taken, I think, from a hair brush.

Dr. Grimsbo informed me that although there was not sufficient quantity for this laboratory to call it with certainty, that they were a very conservative laboratory; that, in fact, what they did have that was not deteriorated would-pointed towards-everything that they did have matched the sample, but there was not sufficient match for them to say with certainty.

Dr. Grimsbo advised Ms. Graser and I that if we subpoenaed them-I asked him about if we subpoenaed them and cross-examined them myself, and Dr. Grimsbo informed me, as I recall, that their testimony would probably be sufficient for the jury to conclude that even though there wasn't enough sample for a conclusive ID, that in all likelihood, that this was Adri[enne] Thomas's DNA. And if I called him, our own expert, that he would have to testify that all of the evidence that they did have pointed towards the conclusion that this was, in all likelihood, Adri[enne] Thomas's DNA. It was Dr. Grimsbo's opinion that we could only help the prosecution by presenting that....

(Ex. 121 at 7-8.) On cross-examination, Mr. Wasson testified that he and Ms. Graser discussed it together, and he recalled that "neither of us saw any options based on what Dr. Grimsbo told us."

(Ex. 121 at 9.) He further testified:

> What he told me–Dr.Grimsbo- the only part I do recall is Dr. Grimsbo telling me that we had lucked out; that if SERI were not such a conservative laboratory, they would appear and testify that in all likelihood – they couldn't say with certainty, but that in all likelihood this DNA was Adri[enne] Thomas's, and that it would be fruitless for us to pursue it....

(Ex. 121 at 11.)

It is clear in the record that trial counsel did pursue DNA evidence or the lack thereof and, based upon what they were told by their expert, Dr. Grimsbo, they concluded that the evidence would hurt petitioner's case, rather then help it. That conclusion was not unreasonable given the information from Dr. Grimsbo.

Petitioner made no showing in the state courts and makes no showing in this court that trial counsel failed to investigate regarding the DNA evidence or show that their decisions in this regard were deficient and not a reasonable tactical choice; nor does he show that he suffered any prejudice since the evidence was that any testimony concerning the DNA would have been inculpatory instead of exculpatory.

The record before the state post-conviction court, the court of appeals, and the supreme court supports the courts' decisions with regard to this ground for habeas relief. Based upon this court's review of the record, the state courts' findings of fact and law with regard to petitioner's claim of inef-

fective assistance of counsel on the ground of counsel's failure to conduct adequate investigation and pursue DNA evidence or the lack thereof, were not clearly erroneous. The court finds that, on this record, the state courts' decisions were not contrary to, or involve an unreasonable application of, clearly established federal law. Petitioner is not entitled to relief under section 2254(d)(1) on this ground.

Based upon the foregoing, the court finds that petitioner is not entitled to relief on his claims of ineffective assistance of trial counsel.

Ground Three subpart b-Denial of due process and equal protection by application of standardless test without identifiable burden of proof.

Petitioner claims that he was denied due process and equal protection of the laws because the court applied a standardless test, including no identifiable burden of proof, in making its determination as to petitioner's fitness to proceed to trial. Respondent contends that the trial court's factual determinations of credibility are entitled to deference under 28 U.S.C. section 2254(e). He contends that the way in which a state allocates the burden of proof is inconsequential, and due process requires only that the state provide access to procedures adequate to protect defendant's right not to be tried or convicted while incompetent. Petitioner contends that, in making its determination, the trial judge at no time articulated what burden of proof, if any, had been employed. He contends that procedural due process requires that the burden of proof to be applied by a trial court in determining whether an individual is competent be clearly established and articulated prior to any decision of the question on the merits. He also contends that, in the absence of statutory directive, the burden of proving competency should be borne by the State once the question of competency is raised. Respondent replies that there is no requirement by the Supreme Court that a state court articulate

on the record the burden of proof to determine competency and, therefore, the trial court's decision was not clearly erroneous.

Under Supreme Court precedent, "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." Drope v. Missouri, 420 U.S 162, 171 (1975). Thus, in federal cases, the Court has approved the following test of competency: "whether a criminal defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he as a rational as well as factual understanding of the proceedings against him.'" Id. at 172 (quoting Dusky v. United States, 362 U.S. 402 (1960)(per curiam)). "[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope, 420 U.S. at 172 (citing Pate v. Robinson, 383 U.S. 375 (1966)). The Court in Medina v. California, 505 U.S. 437, 446-449, 452-53, reh'g denied, 505 U.S. 1244 (1992),[5] held that California's statute placing the burden of proving incompetency by a preponderance of the evidence on the party asserting incompetency did not violate defendant's procedural due process rights; and that the California statute providing that a defendant was presumed to be competent to stand trial did not violate defendant's procedural due process rights. In reaching these conclusions, the Court found that, under the narrower analytical framework of Patterson v. New York, 432

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[5] Medina was decided on June 22, 1992, before the first hearing was held on petitioner's competency, see footnote 6.

U.S. 197 (1977), adopted as the proper approach in assessing the validity of state criminal procedural rules, "there is no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence," and "Contemporary practice...demonstrates that there remains no settled view of where the burden of proof should lie." Medina, 404 U.S. at 443-47. The Court noted that some states place the burden to prove incompetence on the party raising the issue and other courts place the burden on the prosecution. Id. at 447-48 (and cases cited). The Court further found that a rule placing the burden of proving incompetence on defendant did not transgress any recognized principle of fundamental fairness in operation. Id. at 448-51. The Court found that under the California statue, the allocation of the burden of proof to defendant would affect competency determinations "only in a narrow class of cases where the evidence is in equipose; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent. Id. at 449. The Court noted that its cases recognized that

> a defendant has a constitutional right 'not to be tried while legally incompetent,' and that a State's 'failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial,' [but] Once a State provides a defendant access to procedures for making a competency evaluation, however, we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial.

> Id. The Court stated that: "Consistent with our precedents, it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." Id. at 451. For these reasons, the Medina Court concluded that the California procedure was constitutionally adequate to guard against a criminal trial of an incompetent defendant, and reflected the Court's "considered view that '"[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch."' Id. (quoting Patterson, 432 U.S. at 210).

The foregoing was the clearly established Supreme Court precedent at the time that hearings on petitioner's competency were held, in July 1992 through February 1993.[6]

In 1996, after the competency hearings in this case took place, the Supreme Court decided Cooper v. Oklahoma, 517 U.S. 348 (1996). In Cooper, the Court, utilizing the Patterson analytical framework employed in Medina and discussing the rationale of the Medina decision extensively, held that the heightened standard of clear and convincing evidence to prove incompetency, placed on a defendant by Oklahoma's statute, was incompatible with the dictates of due process. The Court noted that the burden imposed in some state, including Oregon, was unclear, but that, "Nothing in the competency statutes or case law of these States suggests, however,

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[6] Competency hearings were held on July 23, 1992, (Part A Vol. I, Tr. at 12); September 9, 1992, (Part A Vol. I, Tr. at 73); and February 5, 1993, (Part A Vol. IIB, Tr. at 2).

that the defendant bears the burden of proving incompetence by clear and convincing evidence." Id. at 361 n.17.

The record indicates that, at the first competency hearing held on July 23, 1992, Dr. Edward Michael Colbach, M.D., testified. (Part A Vol. I Tr. at 17-27.) Dr. Colbach had conducted psychological testing and performed a clinical interview with petitioner, talking to him for "Probably three" hours. He testified that he did not think petitioner was malingering. He testified that petitioner had the classic disordered thinking seen in schizophrenia. (Part A Vol. I Tr. at 18-20, 22.) Dr. Colbach answered, "Yes," to questions asking whether petitioner: understood he's facing trial for murdering Adrienne Thomas; acknowledged that he, in fact, killed her; understood that he had been assigned two individuals to assist in defending him; understood the role of the prosecution; understood that he has the ability to call witnesses; understood the role of the judge; understood that a jury will hear the case; understood that the penalty was death in his case; and that there are lessor offenses that might apply and defenses that apply. (Part A Vol. I Tr. at 23-24.) He testified that petitioner was able to cooperate with counsel, was able to aid and assist. (Part A Vol. I Tr. at 23-25.) Dr. Leslie Goldmann, a psychologist, testified at the hearing. (Part A Vol. I Tr. at 37-53.) Dr. Goldmann interviewed petitioner for about ten hours for the purpose of psychological testing. His diagnoses was schizophrenia. Dr. Goldmann did not think petitioner was malingering. He testified that he was uncertain whether petitioner was able to assist; he thought petitioner could participate but that is was debatable whether he could fully understand. (Part A Vol. I Tr. at 42-45; Ex. 102 App. 4-7.) At the September 9, 1992, competency hearing, Dr. Goldmann testified that he had seen petitioner for an additional hour before he was given Haldol, and for about forty minutes a few weeks later. (Part A Vol. I Tr. at 119-43.) Dr. Goldmann testified

that petitioner could not aid his lawyers in having a meaningful relationship with them in terms of the trial and, therefore, petitioner was not able to aid and assist. (Part A Vol. I Tr. at 130.) Dr. Colbach also testified. (Part A Vol. I Tr. at 144-78.) Changing his opinion as stated at the first hearing, Dr. Colbach testified that petitioner was not able to aid and assist and was not fit to stand trial. (Part A. Vol I. Tr. at 144.) Following the hearing, the court ordered on September 10, 1992, that petitioner be placed in custody of the Oregon State Hospital for competency evaluation. (Ex. 119; Ex. 102 App. 7.) Petitioner's trial attorneys filed with the trial court on February 3, 1993, a Memorandum on Law on Competency to Proceed. Defense counsel contended in the memorandum that the standard applicable to civil commitment, ORS 426.130(1)(b)–a standard of clear and convincing evidence—should by borne by the State, and apply in petitioner's case. (Ex. 120.) On February 5, 1993, a third competency hearing was held. At the start of the hearing, the State brought up the questions of who had the burden of persuasion, who had the burden of production, and who had the presumption. Counsel for the state argued that, under Oregon evidentiary rules, the presumption is one of competency, and that the burden persuasion and production was with petitioner. The court commented: "I don't agree with your observations, counsel, but it makes little difference to the Court. I think the order of proof is a matter of discretion with the Court." (Part A Vol. IIB Tr. at 3-5.) Dr. Richard J. Hulteng, who evaluated petitioner at the state hospital for thirteen hours, testified at the hearing. (Part A Vol. IIB Tr. at 6-31.) Dr. Hulteng testified that petitioner was malingering. (Part A Vol. IIB Tr. at 6; Ex. 103 at 1, 14.) He testified that the initial symptoms reported to him where similar to those reported to Dr. Goldmann and Dr. Colbach, but that petitioner had "backed off" much of the symptoms reported as delusional. Upon a request for clarification by the court, Dr. Hulteng testified that, even if petitioner was

continuing to experience some psychotic symptoms, he had sufficient control over his symptoms that he could deny them, and he could control how he was presenting himself. (Part A Vol. IIB Tr. at 23-25.) Dr. Hulteng concluded in his report filed with the court that petitioner appeared to be a severely character disordered individual; that "While he currently reports a variety of psychotic symptoms, it appears most likely that these are malingered"; and "With respect to the issue of competency to stand trial, the defendant does not appear to suffer from a mental disease or defect which would render him unable to aid and assist in his defense," and "even if it were assumed that the defendant was mentally ill, he appears capable of understanding the nature of the proceedings against him, assisting and cooperating with counsel, and participating rationally in his defense." (Ex. 103 at 15.) Following the conclusion of all testimony and arguments of defense counsel and the State, the court then stated:

> Thank you all.
>
> This hearing concludes a rather lengthy and extensive inquiry into the mental state of this defendant, specifically as to whether or not he is competent to aid and assist his counsel in the defense of the charges brought against him.
>
> In preparation of the hearing this morning, I went back and reviewed my notes regarding the testimony of Dr. Colbach and Dr. Goldmann at the first session, and I think that one of the recollections I have of listening and watching the testimony of Dr. Colbach at that time was his cautious approach to this problem.
>
> I think all of us in the criminal justice system appreciate the contribution that Dr. Col-

bach has made, and I think we all regard his views as very significant. But my feeling, as the factfinder, as I listened to Dr. Colbach was that he was making a considered judgment, that it was a close call for him. That's my own interpretation of how he approached this problem.

I compare his approach and presentation with that of Dr. Hulteng. He has spent 13 hours, as I recall, in interview sessions with this defendant. I believe that he noted that he had made interviews with him on eight different sessions. He's reviewed a large mass of data, factual, medical, which was provided to him by both the defense and the prosecutors. He has written a report that is 15 pages single spaced.

I think what's most significant, or one of the many significant factors, in Dr. Hulteng's evaluation is that the person who presented himself to Dr. Hulteng on some of the interviews was not exhibiting the same symptoms, personality characteristics, that either Dr. Goldmann or Dr. Colbach noted. This backing away syndrome that he detected and mentioned this morning and in his report seems to be of great significance to Dr. Hulteng, and it makes sense to me as the lay person.

So I conclude that one the issue of this man, this defendant's competency, that he does not suffer from mental disease or defect which would render him unable to assist and aid his counsel in the defense of his case. I find that he is capable of understanding the nature of the

> proceedings against him and assisting and cooperating with his counsel and participating rationally in his defense.
>
> Those are my findings and conclusions.
>
> ....

(Part A. Vol. IIB Tr. at 48-50.)

Petitioner raised the issue of burden of proof with the post-conviction court, and that court made findings of fact and conclusions of law as to that ground for relief.[7] (Exs. 109,

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[7] The post-conviction court made the following relevant findings of fact:

> 14. Petitioner challenged the court's findings that he was able to aid and assist in his own defense on direct appeal.
>
> 15. Petitioner was evaluated for his ability to aid and assist in his own defense prior to trial and his fitness was litigated prior to trial.

(Ex. 123 at 5.) The post-conviction court made the following relevant conclusions of law:

> 2. Petitioner failed to meet his burden of proof of any of the claims of his petition.
>
> 3. Those issues which were or which could have been raised on direct appeal cannot be grounds for post-conviction relief.
>
> 4. Those issues which the petitioner could reasonably have been expected to raise at the trial court level, and failed to raise at the trial court level, are not grounds for post-conviction relief.
>
> 5. None of petitioner's rights under the Oregon or United States Constitutions were violated in the

122, 123.) However, as the court has found, petitioner did not raise the issue in the court of appeals of the state supreme court. (Exs. 125, 127.) Accordingly, since this issue was not exhausted on appeal from the post-conviction judgment, this court will not address the post-conviction court's findings relating to the burden of proof issue.

The Oregon statutes relating to competency of a defendant to stand trial provide in pertinent part:

> (2) A defendant may be found incapacitated if, as a result of a mental disease or defect, the defendant is unable:
>
> (a) To understand the nature of the proceedings against the defendant; or
>
> (b) To assist and cooperate with the counsel of the defendant; or
>
> (c) To participate in the defense of the defendant.

ORS 160.360(2) (2001). The statute also provides that the court may order an examination of defendant if it has reason to doubt the defendant's fitness to proceed to trial by reason of incapacity. ORS 161.365(1) provides in pertinent part that the court may call any witness and may appoint a psychiatrist or psychologist to examine defendant to assist it in reaching its decision, and may order that defendant be committed to a state mental hospital. ORS 161.370 provides that the issue of defendant's fitness to proceed shall be determined by the court and, if neither prosecuting or defense counsel contest

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> underlying criminal proceeding such that petitioner is entitled to post-conviction relief.

(Ex. 123 at 5-6.)

the report file by the psychiatrist or psychologist report filed pursuant to ORS 161.365, the court may make it's determination on the basis of the report; or, if the finding is contested, the court shall hold a hearing and the party may cross-examine and offer evidence on the issue. ORS 161.370(1).

The court finds on this record that the trial court was not required by Supreme Court precedent to articulate and allocate on the record the burden of proof used in its determination of whether petitioner was competent to proceed to trial. Under Supreme Court precedents, "it is enough" to satisfy due process that "the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." Medina, 404 U.S. at 451. Such a reasonable opportunity was presented to petitioner here. It was for the trial court as fact finder, to evaluate the credibility of the witnesses who testified, see Maggio v. Fulford, 462 U.S. 111, 117-18, reh'g denied, 463 U.S. 1236 (1983); Demosthenes v. Baal, 495 U.S. 731, 735 (1990), and petitioner has not rebutted any findings of fact made by the state court, 28 U.S.C. §2254(e)(1). The trial court made its determination based on all the evidence before it on the issue of whether petitioner was competent to proceed to trial. The court heard testimony initially from Dr. Colbach and Dr. Goldmann, and other witnesses. The court heard the testimony and had the report of Dr. Hulteng, who stated that petitioner was not reporting the initial symptoms reported to Dr. Colbach and Dr. Goldmann, that petitioner had "backed off" those symptoms reported to these doctors as delusional. Dr. Hulteng testified that petitioner had sufficient control over psychotic symptoms which he might be experiencing, that he could deny them and control how he presented himself. The court found that this "backing away" by petitioner was significant in Dr. Hulteng's evaluation of petitioner.

The court finds on this record that the procedure used by the trial court in making its determination of petitioner's competence did not offend due process and was not clearly erroneous. The state courts' decisions did not involve an unreasonable application of clearly established federal law, as contended by petitioner. Petitioner is not entitled to relief under 42 U.S.C. section 2254(d)(1) on this ground for relief.

Evidentiary hearing

Petitioner contends that an evidentiary hearing should be held to determine whether a retrospective competency decision can be made. Because the court has found that petitioner has procedurally defaulted his ground for relief that his due process right not to stand trial if incompetent was violated by the state court's decision finding him fit to proceed, this argument will not be addressed by the court.

Conclusion

The court finds that petitioner is not entitled to habeas relief on any of the grounds asserted for relief which are not procedurally defaulted.

III. RECOMMENDATION

Based upon the foregoing, it is recommended that respondent's motion to deny habeas corpus relief be granted, and the petition for writ of habeas corpus be dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten days within which to file a response to the objections. Failure to timely

file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 6 day of May, 2002.

/s/ John P. Cooney
UNITED STATES MAGISTRATE JUDGE

(3)

Supreme Court, U.S.
FILED
FEB 2 2 2005
OFFICE OF THE CLERK

No. 04-576

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

MICHAEL RAY LOUNSBURY,

Respondent.

MOTION FOR LEAVE
TO PROCEED *IN FORMA PAUPERIS*

Respondent, Michael Ray Lounsbury, requests leave to file the attached Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this Court and 18 U.S.C. §3006A(d)(7). Respondent was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals, and therefore no affidavit is required.

RESPECTFULLY SUBMITTED this 22nd day of February, 2005.

Christopher J. Schatz
Attorney for Cross-Petitioner

No. 04-576

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

MICHAEL RAY LOUNSBURY,

Respondent.

Petition for Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Michael Ray Lounsbury, through his attorney of record, Assistant Federal Public Defender, Christopher J. Schatz, does hereby respond to the Petition for Writ of Certiorari as heretofore filed in the above-entitled action by Petitioner Brian Belleque, Superintendent, Oregon State Penitentiary (hereinafter "Belleque Petition").[1]

QUESTION PRESENTED

Superintendent Belleque contends that, with respect to the decision in *Lounsbury v. Thompson*, 374 F.3d 785 (9th Cir. 2004), the Ninth Circuit erred in holding that Mr. Lounsbury successfully exhausted his substantive competency claim so as not to be subject to procedural bar with respect to litigation of that claim in federal habeas. Belleque Petition, at p. 3 ("Whether Lounsbury raised in that petition [his Petition for Review to the Oregon Supreme Court] his substantive claim that he was not competent to stand trial is the central inquiry in this case."). On the basis of this view of the *Lounsbury* decision, Superintendent Belleque contends that the *Lounsbury* case presents the following issue for review by this Court:

> Does a state prisoner fairly present the "substance" of his federal corpus claim to the state's highest court when he does not raise that specific legal and factual claim before that court, but instead raises only a related claim?

In response, Mr. Lounsbury contends that Superintendent Belleque's statement of the issue presented does not accurately reflect the facts and the actual procedural history of Mr. Lounsbury's litigation in the Oregon courts of the substantive and procedural issues pertaining to his competency to be brought to trial in a capital case. Furthermore, Mr. Lounsbury submits that the proper characterization of the logical and factual relationship between his procedural and substantive claims is not

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[1] This response is tendered in compliance with the Court's request, as communicated to Mr. Lounsbury by letter dated January 18, 2005, that Mr. Lounsbury formally respond to the arguments raised by Petitioner Belleque.

one of mere 'relatedness,' but rather that the latter claim was and is incorporated within and logically subordinate to the former claim. In other words, a finding in favor of Mr. Lounsbury's procedural claim would necessarily have led to analysis of the constitutional sufficiency of the state trial court's finding (as to the substantive claim) that he was competent to proceed to trial.

STATEMENT OF THE CASE

In his petition, Petitioner Belleque sets forth a statement of the procedural history of Mr. Lounsbury's litigation. Belleque Petition, at pp. 2-9. Mr. Lounsbury notes that the Ninth Circuit also set forth a detailed statement of the procedural history of the case in its opinion. 374 F.3d at 786-87. Mr. Lounsbury concurs with the Ninth Circuit's recount. Mr. Lounsbury further notes that Petitioner Belleque's statement fails to make any mention of the Memorandum of Law on Competency to Proceed that was filed by Mr. Lounsbury in the state trial, appellate, and supreme courts in support of his claims of both substantive and procedural error in the determination that he was competent to proceed to trial.

RESPONSE TO PETITIONER'S STATEMENT OF REASONS FOR GRANTING THE WRIT

A. The *Ratio Decidendi* Used By The Ninth Circuit In *Lounsbury v. Thompson* Is Consistent With The Supreme Court's "Fair Presentation" Jurisprudence.

In *Lounsbury*, 374 F.3d at 789, following a careful and detailed review of the procedures utilized in the Oregon state court system with respect to appellate review, the Ninth Circuit held as follows:

> [W]e hold that Lounsbury adequately exhausted his substantive claim where (1) that claim was closely related to, and concerned the very same legal ruling as, the claim that was concededly adequately raised; (2) the Oregon Supreme Court, under its own rules, could have reached the substantive competency issue had review been granted because it was squarely raised in the Court of Appeals brief; (3) the text of the

petition includes the substantive claim; and (4) had the Oregon Supreme Court accepted review even over the procedural issue only, it could have discussed the strength of the substantive competency claim in the course of conducting a harmless error analysis for the procedural competency claim.

Petitioner Belleque attacks the Ninth Circuit's resolution of the exhaustion/procedural bar issue, with respect to Mr. Lounsbury's substantive competency claim, on five separate, albeit inter-related grounds. These grounds are:

1. The Ninth Circuit's decision undermines this Court's "fair presentation" jurisprudence. Belleque Petition, at p. 12 -19.

2. The Ninth Circuit's decision repeats the analytical error condemned in *Baldwin v. Reese* by substituting "a state's court's opportunity to find a federal claim, for a habeas petitioner's obligation to present a claim." Belleque Petition, at pp. 19-20.

3. The Ninth Circuit's decision violates the principle of comity by failing to give proper deference to Oregon's state court rules and practices. Belleque Petition, at pp. 21-24.

4. The Ninth Circuit's decision has "devalued the fair presentation requirement by indicating that a mere passing reference to an argument made in a state trial court serves to fairly present that legal argument . . .." Belleque Petition, at pp. 25-26.

5. The Ninth Circuit's decision improperly took into consideration the absence of any reason to assume that Mr. Lounsbury's counsel chose to abandon his substantive competency claim. Belleque Petition, at pp. 26-27.

In making these arguments, Petitioner Belleque continues a lengthy course of litigation by the state in an attempt to block scrutiny of the competency decision in Mr. Lounsbury's case.[2] These

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[2] When Mr. Lounsbury sought to challenge the substantive determination that he was competent in his Oregon post-conviction review proceeding, the State took the position that the issue had already been authoritatively resolved against him during the course of his direct appeal proceedings. In its post-conviction review trial memorandum, the State argued: "Because this issue has been addressed on appeal . . . this claim cannot be grounds for post-conviction relief." Defendant's Trial Memorandum [Habeas Record Respondent's Exhibit 112 , at p. 12]. The state

arguments also fail to take into consideration the fact that Mr. Lounsbury's direct appeal proceedings took place in 1994 and 1995, and that his counsel, in drafting the petition for review to the Oregon Supreme Court, did not have the benefit of this Court's clarifying opinion in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Furthermore, Petitioner Belleque's arguments fail to acknowledge or address the respectful balance that has been achieved in the Ninth Circuit regarding the interplay among (1) the obligation of the Oregon state court system to hear and determine federal constitutional claims of error, (2) the doctrine of comity, and (3) the solemn duty of the federal courts to ensure that claims of constitutional error by incarcerted defendants are reviewed.

1. The decision in *Lounsbury v. Thompson* is consistent with the Supreme Court's "fair presentation" jurisprudence and the requirement that state courts be given the first opportunity to resolve federal constitutional issues.

An application for a writ of habeas corpus shall not be granted unless it appears that the applicant "has exhausted the remedies available in the courts of the State . . .." 28 U.S.C. § 2254(b)(1)(A). To meet this requirement a petitioner must present his claim of federal constitutional error to the state's highest court in a manner that will enable it to engage in meaningful review of the claim on its merits. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). A petitioner satisfies the exhaustion requirement by providing the state courts with a "full and fair" opportunity to consider his claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). Fair presentation requires that a petitioner describe in the state court proceedings "both the operative facts and the legal theory on

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post-conviction court agreed ("Petitioner challenged the court's findings that he was able to aid and assist in his own defense on direct appeal"), and consequently declined to review the competency decision. Findings Of Fact, Conclusions Of Law [Habeas Record Respondent's Exhibit 122], at p. 5.

which his claim is based." *Keating v. Hood*, 922 F.Supp. 1482, 1490 (C.D. Cal. 1996). What is essential is that the state court "be alerted to the fact" that the petitioner is asserting a claim under the federal constitution. *Duncan v. Henry*, 513 U.S. 364, 365 (1995).

Whether a state supreme court actually considered a petitioner's federal constitutional claim is irrelevant. *Castille*, 489 U.S. at 350. What is critical to the exhaustion question is whether the state courts had the "initial opportunity" to pass upon and correct alleged violations of a prisoner's federal constitutional rights. *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).

In the course of the state competency proceedings, Mr. Lounsbury's counsel argued (1) Mr. Lounsbury was unable to aid and assist in the preparation of his defense because his mental condition prevented him from making rational decisions called for by the litigation process in a capital case (substantive claim); and (2) as a matter of due process, the state should be required to prove a defendant's competence to stand trial by clear and convincing evidence (procedural claim).[3] These contentions were supported by citation and reference to pertinent decisions of the United States

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[3] Competency disputes can give rise to two distinct claims – substantive and procedural – under the due process clauses of the Fifth and Fourteenth Amendments. *See Williams v. Woodford*, 306 F.3d 665, 704-05 (9th Cir. 2002). Competence to stand trial "is an aspect of substantive due process." *Sena v. New Mexico State Prison*, 109 F.3d 652, 655 (10th Cir. 1997). A competency claim based upon procedural due process involves a defendant's constitutional right, once a bona fide doubt has been raised as to competency, to an adequate state procedure to ensure that he is in fact competent to stand trial. *Pate v. Robinson*, 383 U.S. 375, 385 (1966). A procedural due process claim is also presented when an issue is raised as to whether the correct standard for determination of competency was used. *Barnett v. Hargett*, 174 F.3d at 1134; *see also Van Woundenberg v. Gibson*, 211 F.3d 560, 567 (10th Cir. 2000) (use of unconstitutional burden of proof gives rise to procedural competency claim). Although the focus of analysis differs between a substantive claim (Was the accused competent?) and a procedural claim (Was the state's procedure for determining competence satisfactory?), the two prongs of analysis are linked practically and in principle by the overarching due process prohibition against trial of an incompetent defendant. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975) (noting that the right of a criminal defendant to be tried only if competent is "fundamental to an adversary system of justice").

Supreme Court set forth in a memorandum filed by Mr. Lounsbury's counsel. *See* Memorandum of Law on Competency to Proceed (hereinafter "Memorandum of Law"), at pp. 2-5.[4]

In the Oregon Court of Appeals, Mr. Lounsbury charged that the trial court erred in finding him competent, and that this determination of fitness had been occasioned by the trial court's failure to articulate and employ a constitutionally valid burden of proof. *See* Appellant's Opening Brief, at p. 9. These contentions were supported by numerous references in Mr. Lounsbury's appellate brief to the attached Memorandum of Law. *Id.* at pp. 6, 8, and 9.

In Mr. Lounsbury's Petition For Review to the Oregon Supreme Court he continued to challenge the state trial court's decision finding him competent: "Here, defense counsel below argued that their client was not able to aid and assist. He clearly suffered from a mental condition." Petition For Review, at p. 5.[5] Mr. Lounsbury's reference to his incompetence underscored his contention concerning the constitutional inadequacy of a competency determination made in the absence of any articulated burden of proof. *See* Petition For Review, at p. 3. The thrust of Mr. Lounsbury's argument was that, were an appropriate burden of proof utilized, the trial court's error in finding him competent would be clearly revealed.

In *Picard v. O'Connor*, 404 U.S. 270, 275 (1971), the Supreme Court observed that exhaustion requires that a state prisoner "present the state courts with the same claim he urges upon

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[4] Mr. Lounsbury's Memorandum of Law was affixed as an exhibit to his Appellant's Opening Brief before the Oregon Court of Appeals [Habeas Record Respondent's Exhibit 102], and his Petition for Review to the Oregon Supreme Court [Habeas Record Respondent's Exhibit 106]. A copy of Mr. Lounsbury's Petition for Review and its accompanying attachments, including the Memorandum of Law, is contained in Appendix I to this Response.

[5] The opening sentence of the attached Memorandum of Law also clearly advances the substantive competency issue: "The defendant has moved the court to determine his competence to proceed, and he has argued that he is not competent to proceed." Memorandum of Law, at p. 1.

the federal courts." However, the Court also noted that there will be instances "in which 'the ultimate question for disposition,' (citation omitted), will be the same despite variations in the legal theory or factual allegations urged in its support." *Id.* at 277. The ultimate mixed legal and factual question presented by Mr. Lounsbury was whether he was competent to stand trial – a question he litigated by means of the procedural and substantive issues he addressed to the Oregon state courts.

Mr. Lounsbury's claim of error in the trial court's substantive determination of competency is a logical corollary to the procedural issue represented by his challenge concerning the appropriate burden of proof. The former issue was necessarily included within the presentation of the latter issue; in other words, had the Oregon Supreme Court undertaken to resolve the procedural issue presented by the text of the Petition For Review, its analysis would necessarily have encompassed the state trial court's decision with respect to the substantive issue of Mr. Lounsbury's competence to stand trial.[6]

Petitioner Belleque contends that the holding in *Lounsbury* will "expand significantly the range of issues that can be raised in federal habeas cases," and that the Ninth Circuit has shifted the burden of proof regarding fair presentation onto the state "by assuming that a state prisoner's attorneys would not have abandoned a federal claim in state court, unless there was some reason to assume that they would have done so." Belleque Petition at pp. 10-11. These hyperbolic contentions

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[6] No indication is given in the state trial court record of the competency proceedings as to what burden of proof the trial court actually applied. Hence, had the Oregon Supreme Court rendered a decision with respect to identification and allocation of the applicable burden of proof, resolution of this procedural issue would necessarily have led to review of the trial court's competency determination for the purpose of determining whether the "correct" procedure was in fact employed, or, as noted in *Lounsbury*, 374 F.3d at 789, whether any procedural error was subject to characterization as harmless.

are not supported by the record in this matter or by the state of the law, and consequently they should be rejected.

In *Picard*, 404 U.S. at 278, the Supreme Court held that "the substance of a federal habeas corpus claim must first be presented to the state courts." While the semantic contours of the term "substance" remain indefinite, it is clear that the "fair presentation" requirement is claim-specific in terms of both the fact(s) and the legal theory(ies) advanced by a habeas petitioner as grounds for relief. *Cf. Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347 (2004)(a Sixth Amendment claim of ineffective assistance of trial counsel does not fairly present a Fourteenth Amendment due process claim as to ineffective assistance of appellate counsel). Moreover, to be fairly presented, the substance of the federal constitutional claim must be contained in the record at each rung of the state court system. *See Castillo v. McFadden*, 370 F.3d 882, 887 (9th Cir 2004)("To exhaust his claim, Castillo must have presented his federal constitutional issue before the Arizona Court of Appeals within the four corners of his appellate briefing."); *see also Baldwin*, 124 S.Ct. at 1351 ("[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does.").

As noted *ante* at p. 7, Mr. Lounsbury's petition for review told the Oregon Supreme Court that he had contended in the trial court, and was continuing to contend, that he was not competent to proceed. The attached Memorandum of Law also advanced this assertion and set forth the governing federal law with respect to the constitutional requirements for a valid competency determination. The Oregon Supreme Court did not have to read Mr. Lounsbury's court of appeals

brief or any other materials outside the record before it in order to be apprised that he was challenging the state trial court's substantive competency determination.

Petitioner Belleque contends that *Grey v. Netherland*, 518 U.S. 152 (1996), "may be the case," in the series of Supreme Court decisions that have addressed the "fair presentation" requirement, "that is most like this one because it involved what might have been seen as 'related' claims." Belleque Petition, at p. 15. Mr. Lounsbury has no quarrel with the proposition that claims that are externally "related" to other unquestionably exhausted claims, because they arise out of the same set of facts (*see Rose v. Palmateer*, 395 F.3d 1108 (9th Cir. 2005), or invoke the same constitutional provision and legal theory (*see Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003)), will not on the basis of such "relatedness" alone satisfy the fair presentation requirement. However, *Grey v. Netherland* is simply not apposite to the issues and decisions made in Mr. Lounsbury's case.

In *Grey*, the petitioner sought to raise two claims concerning the prosecution's introduction of other-crimes evidence in his penalty-phase proceedings. 518 U.S. at 164-66. One claim alleged a violation of the petitioner's due process right to notice and an opportunity to be heard as to the admissibility of the evidence. This claim had been fairly presented. The second claim alleged a violation of the petitioner's right not to be misinformed by the prosecution as to the evidence that it intended to present against him. According to the Commonwealth of Virginia, this second claim "was never argued before in any court." *Id.* at 165. The Supreme Court held, even though both claims invoked due process, that the two claims were "separate," and, therefore, if the second claim had not been fairly presented to the state court system, it was barred from review absent demonstration of cause and prejudice.

The relationship between the claims considered by the Court in *Grey* was external - that is, a relationship based solely on a grounding in the same set of facts and a general appeal to due process. A decision on the issue of notice would not have any direct, logically compelled effect on the resolution of the separate issue of prosecutorial misinformation. The relationship between the procedural and substantive claims pertaining to the competency determination in Mr. Lounsbury's case is significantly different. Here, the relationship is an internal, logical relationship, such that resolution of the procedural claim (what burden of proof applies) necessarily draws into question the constitutional sufficiency of the substantive competency determination (was there sufficient proof of Mr. Lounsbury's ability to aid and assist?).[7] Thus, as a matter of both text and logic, the Oregon state courts were given the first opportunity to address Mr. Lounsbury's due process claim of error with respect to the determination that he was sufficiently competent to be brought to trial in a capital case.

2. The *Lounsbury* opinion did not shift the burden of proof with respect to fair presentation.

The Ninth Circuit observed that: "To read Lounsbury's petition for review without being aware of the substantive competency claim would be to impute a strategic choice to abandon the substantive claim." *Lounsbury*, 374 F.3d at 788. Petitioner Belleque contends that in so stating the

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[7] Criticizing the Ninth Circuit's description of Mr. Lounsbury's claims as "closely related" (*Lounsbury*, 374 F.3d at 789), Petitioner Belleque erroneously contends that this is an "assumption that is supported only by the fact that both claims relate to the ultimate determination of competency . . .." Belleque Petition, at p. 19. What is critical, however, and the point that Petitioner Belleque fails to address, is not simply that the two claims are related to the determination of competency, but "how" they are related to that determination. Petitioner Belleque's argument ignores the unique logical interrelationship and internal ordering between Mr. Lounsbury's procedural and substantive claims. When that logical interrelationship is properly assessed, it is clear that the "substance" of Mr. Lounsbury's ultimate claim (in terms of both its procedural and substantive components), that he was not competent to aid and assist, was fairly presented to the Oregon state courts.

Ninth Circuit shifted the burden of proof regarding fair presentation. Belleque Petition, at p. 11. Once again, this contention fails to accurately reflect the nature of the analysis conducted by the federal court of appeals. The procedural default doctrine has been described as a form of "waiver" rule - i.e., if a petitioner waives his right to present his federal constitutional issues to the state courts in the first instance, he will be procedurally barred from raising them in federal habeas. *O'Sullivan v. Boerckel*, 526 U.S. 838, 850-53 (1999)(Stevens, J., dissenting). The Ninth Circuit's statement, concerning the absence of any indication of an intent to abandon the substantive competency claim, is simply a comment on the fact that, on the basis of the text before it, the very same text that was presumably read by the Oregon Supreme Court, there was nothing to suggest that Mr. Lounsbury had waived or intentionally relinquished that claim. Thus, any informed reader of the Petition for Review would have been aware that the substantive competency determination was still being contested.

3. The *Lounsbury* decision did not devalue the requirement of fair presentation or undermine the principle of comity.

Petitioner Belleque argues that the *Lounsbury* decision "undermines the principles of comity that underlie the 'fair presentation' requirement . . .." Belleque Petition, at p. 18. According to Petitioner Belleque, the "opportunity" to adjudicate an issue does not excuse a litigant's failure to fairly present the issue to the state supreme court: "To rely, as the Ninth Circuit did, on the probability that the state Supreme Court might have considered the substantive claim, had it granted review on the procedural issue, is not only to make an assumption that is contrary to the state court's customary practice, it is tantamount to 'forc[ing] state appellate judges to alter their ordinary review practices.' *Reese*, 158 L.Ed.2d at 70." *Id.*, at p. 22. In advancing this contention, Petitioner Belleque

has misread and/or misinterpreted the thrust of the Ninth Circuit's reasoning. Furthermore, Petitioner Belleque's brief is strangely silent as to exactly what is the Oregon Supreme Court's "customary practice."

In Mr. Lounsbury's view, the reason for Petitioner Belleque's reticence is that the practice of the Oregon Supreme Court is at odds with the key assumption on which the principle of comity is based - the assumption that state courts will affirmatively undertake the task of conducting case-by-case reviews for constitutional error. Neither the Oregon Rules of Appellate Procedure, nor the actual practices of the Oregon Supreme Court, countenance routine fact or case-specific review activity by the Supreme Court. Consequently, as the Ninth Circuit recognized, "Oregon attorneys are thus presented with the dilemma of having to say enough in their petitions for review to exhaust under *O'Sullivan* while, if possible, presenting claims not so fact or case-specific that they run afoul of the Oregon Rules of Appellate Procedure." *Lounsbury*, 374 F.3d at 789.

The determination whether a habeas litigant has "fairly presented" a federal constitutional claim to a state appellate court is text dependent - i.e., it is a decision that is for the most part dependent on a "reading" of the petitioner's brief and such other materials of record as are available for review. However, this "reading" cannot take place in the abstract. Rather, any reading of a habeas petitioner's brief must take into consideration the rules of procedure and customary practice enforced by the appellate court, because the manner of presentation of the petitioner's claims (the syntax of the argument) will be dictated by those rules of procedure and customary practice.

The role performed by the Oregon Supreme Court is to serve as a "law announcing" court, and not an "error correcting court." *State v. Tolomei*, 287 Or. 701, 706-07, 601 P.2d 1251, 1254

(1979). As former Chief Justice Denecke observed, in *K. v. Health Division, Department of Human Resources*, 277 Or. 371, 560 P.2d 1070 (1977) (concurring opinion):

> Whether any court of final review will grant a petition for review depends largely upon the view the court takes of its function. If the court believes its function is to correct errors it will grant a petition for review anytime it is of the opinion that further consideration will probably result in the conclusion that error was committed. On the other hand, if the court views its function as a law-announcing body it will not regard even clear error as a ground for granting a petition for review. Such a court will grant petitions for review only if the issue is one of public or legal importance.
>
> I view this court, in considering petitions for review, to be primarily a law-announcing body, not an error-correcting court. I take this view not because of any exalted notions of the capabilities of this court, but because of judicial efficiency. We can competently decide only so many cases and we should limit ourselves to those cases which are of the most overall importance.

The Oregon Rules of Appellate Procedure pertaining to the contents of a petition for review emphasize the state supreme court's role as a law-announcing body rather than an error-correcting body.[8] In this regard, as of the time period of Mr. Lounsbury's filing of his Petition for Review, former Rule 9.05(3)(b) required that a petition for review contain "[c]oncise statements of the legal

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[8] Formal rules of procedure can cast light on, but they rarely completely define, the actual practices of an institutional body, such as a court. Thus, insight into an institutional body's actual behavior, and how to influence that behavior, must be gleaned from other sources. In 1999, then Oregon Supreme Court Justice Susan M. Leeson described the practice of the Supreme Court as follows: "[The supreme] court is primarily a law announcing court. If someone asks us to review a case from the [c]ourt of [a]ppeals merely to correct an error, the [supreme court] is unlikely to take that case." Weiner, *Does Oregon's Appellate Court System Need Fixing?*, 81 OR. L.REV. 477, 495 (2002). Reviewing the current rule of procedure applicable to the Oregon Supreme Court, the *Lounsbury* decision observed: "Under Rule 9:05(7)(f) & (8), it appears that a claim that the Court of Appeals erred in a case-specific way could not properly be expressly raised in a petition for review." 374 F.3d at 789. Petitioner Belleque takes issue with this analysis claiming that the "Ninth Circuit gave an incorrect citation for the pertinent rule." Belleque Petition, at p. 23, n. 8. Not only is this criticism unfounded, but the Belleque Petition itself cites to a subpart of Rule 9.05 that does not exist in either the 1995 or 2004 versions of that rule. *See* Belleque Petition, at pp. 22-23 (referring to Or. R. App. P. 9.05(4)(a)(iv) and (b), although there is no sub-section (4)(a)(iv) in either the former or current versions of that rule).

question or questions presented on review and of the rule of law that the petitioner proposes be established, if review is allowed."[9] With respect to the Oregon Supreme Court's criteria for the granting of discretionary review, Rule 9:07(1) provided then (as it does now) that the foremost criterion was: "Whether the case presents a significant issue of law." Litigants seeking supreme court review in the Oregon state court system are thus confronted with a difficult task. In order to comply with the rules governing exercise of the supreme court's discretionary review, a litigant must frame the issue tendered for review as presenting an important question of law, and each issue so presented must be accompanied by a statement as to "the rule of law that petitioner proposes be established, if review is allowed." Or. R. App. P. 9.05(7)(b) [2004].[10]

Mr. Lounsbury's Petition For Review followed the format required by former Rule 9.05(3)(b) insofar as it featured, as his primary legal issue for decision, the procedural question concerning the appropriate burden of proof in a criminal case competency proceeding. But, in complying with former Rule 9.05(3)(b), Mr. Lounsbury did not abandon the substantive issue of his then present ability to aid and assist. Mr. Lounsbury's petition specifically noted that his defense counsel had argued he was "not able to aid and assist." Furthermore, as noted *ante* at p. 6, Mr. Lounsbury's procedural claim that the trial court had failed to apply an appropriate burden of proof necessarily raised as well the substantive claim that the trial court had erred in finding him competent to stand

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[9] The text of former Rule 9:05(3)(b) is now found in Oregon Rule of Appellate Procedure 9:05(7)(b) (2004 ed.). The Oregon Supreme Court's continuing focus on questions of policy and law is further demonstrated by the requirement, now set forth in Oregon Rule of Appellate Procedure 9:05(7)(f), that the petition for review shall contain a "statement of specific reasons why the issues presented have importance beyond the particular case and require decision by the Supreme Court."

[10] At the time of the filing of Mr. Lounsbury's petition the quoted text was set forth in former Rule 9.05(3)(b) (1994 ed.).

trial. Thus, even the most cursory consideration of his petition would have brought the substantive issue of his competency to the attention of the Oregon Supreme Court.

The determination of Mr. Lounsbury's substantive competency issue was, as a consequence of the requirements of Rule 9.05(3)(b), presented in his petition for review as a subsidiary issue to the procedural issue pertaining to the trial court's failure to recognize and allocate the burden of proof. However, given the logical interrelationship between the substantive and procedural competency issues presented by Mr. Lounsbury's case, the fact that the substantive issue was a subsidiary issue did not prevent it from being fairly presented. *C.f. Odem v. Hopkins*, 192 F.3d 772, 775 (8th Cir. 1999) ("Even though the issue of the State's turning over of exculpatory evidence is contained solely within an argument pertaining to ineffective assistance of counsel, it is clear that *Odem* raised both the facts and the legal argument pertaining to his *Brady* violation before the state court.")[11]

The relationship between two claims of error may be viewed as strictly logical where the resolution of one claim either necessarily dictates or constitutes a condition precedent to resolution of the other. For example, commenting on logical entailment, in the context of describing the circumstances under which a new rule may be made retroactive by a decision of the United States Supreme Court per the terms of 28 U.S.C. § 2244(b)(2)(A), in *Tyler v. Cain*, 533 U.S. 656, 669

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[11] In *Peterson v. Lampert*, 277 F.3d 1073, 1077 (9th Cir. 2002), the court noted that the rules of procedure governing Oregon Supreme Court practice permit that court "to review subsidiary appellate issues" that necessarily require resolution once the principle issue on review has been resolved. Moreover, as the Ninth Circuit observed in *Wells v. Maass*, 28 F.3d 1005, 1009 (9th Cir. 1994), under the Oregon Rules of Appellate Procedure, the Oregon Supreme Court has the power to review claims not raised in a party's petition so long as they were raised in the Oregon Court of Appeals. This is particularly the case with respect to subsidiary appellate issues (previously properly raised and preserved) that require resolution once the principal issue presented for review has been decided. *See State v. Castrejon*, 317 Or. 202, 211-12, 856 P.2d 616 (1993).

(2001) (O'Connor, J., concurring), Justice O'Connor wrote: "The relationship between the conclusion that a new rule is retroactive and the holdings that 'ma[k]e' this rule retroactive, however, must be strictly logical – i.e., the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively."

Mr. Lounsbury contends that the relationship between the procedural and substantive prongs of the competency determination in his case is founded on a similar internal relationship of logical connectivity; i.e., resolution of the procedural issue necessarily implicates and draws into play the substantive issue. Had the Oregon Supreme Court accepted review, and found that Mr. Lounsbury's competency proceeding was standardless and thus constitutionally deficient, it would have had to find either that the procedural error was harmless or that the trial court's determination of competence was invalid. Similarly, even if the Supreme Court had sustained the trial court's standardless approach, it would still have had to assess and comment upon the reasonableness of that approach in terms of the result reached in order to fully adjudicate the issue(s) presented by the Petition For Review. Hence, in light of the Oregon Supreme Court's own rules, an opportunity to adjudicate the constitutional adequacy of the trial court's fitness determination was clearly presented to that court by Mr. Lounsbury's Petition for Review.

Mr. Lounsbury submits it was entirely reasonable for the Ninth Circuit to take into account what the situation would have been had the Oregon Supreme Court granted review: "[T]he Oregon Supreme Court, under its own rules, could have reached the substantive competency issue had review been granted because it was squarely raised in the Court of Appeals brief." *Lounsbury*, 374 F.3d at 789. In denying review, the Oregon Supreme Court stated: "The Court has considered the petition for review and orders that it be denied." *See* Order Denying Review [Habeas Record

Respondent's Exhibit 107]. Clearly, the Oregon Supreme Court performed some action with respect to Mr. Lounsbury's Petition for Review - it "considered the petition." In order to determine what "considered" meant as that term was used by the Supreme Court, it was incumbent on the Ninth Circuit to look to the Oregon appellate rules of procedure and to consider, as it may be assumed the Oregon Supreme Court did, what would have taken place had review been granted.[12] Contrary to Petitioner Belleque's argument (Belleque Petition, at p. 20), this analysis did not substitute consideration of the state's opportunity to discover a federal claim, in the place of the petitioner's obligation to fairly present that claim in the state court system. Rather, it served to inform the Ninth Circuit's assessment of Mr. Lounsbury's Petition for Review as regards whether that text was sufficient to give the Oregon Supreme Court an opportunity to resolve both his procedural and substantive due process claims had it chosen to act. The Ninth Circuit answered this question in the affirmative, and in doing so it presumed nothing more on the part of the Oregon Supreme Court other than compliance with its own rules.

B. *Baldwin v. Reese* Supports Mr. Lounsbury's Claim That His Petition For Review Alerted The Oregon Supreme Court To The Substantive Due Process Competency Issue.

In *Baldwin v. Reese*, 124 S.Ct. 1347 (2004), the Supreme Court focused again upon the requirement of "fair presentation." Following his conviction in state court, Reese sought post-conviction review through Oregon's state court system on the ground that his trial counsel's conduct

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[12] Oregon Rule of Court 9.20(2) provides: "If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals."

violated several provisions of the federal constitution. Reese also claimed that his appellate court counsel had been ineffective. However, in his post-conviction review petition before the Oregon Supreme Court, Reese did not explicitly premise his ineffective assistance of appellate counsel claim on federal law. Consequently, the federal district court held that Reese had not "fairly presented" his federal ineffective assistance of appellate counsel claim to the Oregon state courts because his "brief in the state appeals court had not indicated that he was complaining about a violation of federal law." *Id.* at 1350.

A divided panel of the Ninth Circuit reversed the district court. *United States v. Reese*, 282 F.3d 1184 (2002). The majority found that Reese had satisfied the "fair presentation" requirement because the justices of the Oregon Supreme Court had "the opportunity" to read the lower Oregon court decision that Reese claimed to be in error before deciding whether to grant discretionary review. The Supreme Court disagreed. Reversing the decision of the Ninth Circuit Court of Appeals, the Supreme Court stated:

> But to say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that those judges must read the lower court opinions – for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance. In our view, federal habeas corpus law does not impose such a requirement.

Baldwin v. Reese, 124 S.Ct. at 1350.

Contrary to the situation before the Court in *Baldwin*, to be apprised of Mr. Lounsbury's substantive competency claim, the members of the Oregon Supreme Court had to look no further than his Petition for Review and the Memorandum of Law attached thereto. This is not a case where the manner of Mr. Lounsbury's presentation of his procedural and substantive issues to the Oregon Supreme Court placed that court in the position of "looking for a needle in a paper haystack." *Grey*

v. Hoke, 933 F.2d 117, 120 (2nd Cir. 1991). Rather, the text of Mr. Lounsbury's petition made it clear that he continued to challenge the determination that he was competent, and that he was relying on the law and argument set forth in the Memorandum of Law to flesh out and support the statement of the issues and argument contained in the body of his brief. By directing the attention of the state supreme court to the points and law contained in the attached memorandum, Mr. Lounsbury fairly presented both his procedural and his substantive competency claims for decision. *Cf. Morgan v. Bennett*, 204 F.3d 360, 370-71 (2nd Cir. 2000) (finding fair presentation of issues advanced in pro se supplemental brief); *Kim v. Villalobos*, 799 F.2d 1317, 1320-21 (9th Cir. 1986) (finding exhaustion based on attachment of petition filed with court of appeals to supreme court brief).

CONCLUSION

In *Baldwin*, the Supreme Court held that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." 124 S.Ct. at 1351. Although Mr. Lounsbury's Petition for Review focused on the procedural claim, as required by Oregon Rule of Appellate Procedure 9.05(3)(b), it also effectively alerted the state supreme court to the secondary federal claim of error premised on the state trial court's erroneous determination of competency.

Mr. Lounsbury's substantive and procedural due process claims arose out of the same facts, and involved the same basic complex of issues pertaining to competence. It is inconceivable that a reasonable jurist would not have been led, in the course of examining the primary procedural claim (as to what due process requires with respect to a competency determination), to give consideration

to the secondary substantive claim (as to whether the trial court erred in finding Mr. Lounsbury able to aid and assist).

As observed by Justice O'Connor in her opinion for the Court in *Rose v. Lundy*, 455 U.S. 509, 518 (1982), the exhaustion and comity doctrines serve to ensure the participation of the states in the preservation and protection of federal constitutional rights:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. ... Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." ... Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

(Citations omitted).

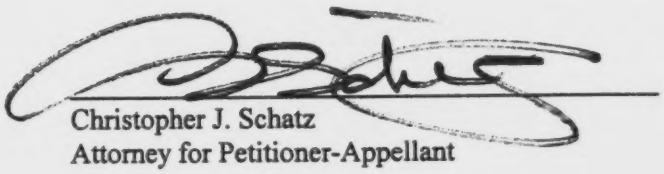
The "fair presentation" requirement has been imposed by the Court as a means of ensuring that state courts participate, as the doctrine of federalism contemplates, in the enforcement of rights recognized by the federal constitutional. However, this requirement must not become so formalistic in its application as to enable state courts to shirk their federal constitutional responsibilities while at the same time cutting off federal habeas review. Where state court systems are as plainly adverse to conducting individual case reviews involving fact-specific claims of constitutional rights violations as is the Oregon state court system, the federal courts' ultimate responsibility for ensuring the preservation and protection of the rights established by the Constitution requires a more temperate approach to the enforcement of the fair presentation requirement.

Contrary to Petitioner Belleque's contentions, in its decision in Mr. Lounsbury's case the Ninth Circuit did not misread the state rules of appellate procedure, nor did it fail to give due

deference to the Oregon Supreme Court's reading of its own rules. For many years, the Ninth Circuit has been engaged in attempting to balance this Court's directives concerning habeas procedure against the Oregon state court system's antithetical policies and procedures. *See Batchelor v. Cupp*, 693 F.2d 859, 863 (1982);[13] *see also Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) (commenting on the "unique difficulties" created by the Oregon Supreme Court's penchant for summary adjudication and affirmation without opinion of federal constitutional error claims). Within the context of this ongoing struggle, and given the unique characteristics of the issues raised by Mr. Lounsbury, the Ninth Circuit's resolution of the "fair presentation" issue in this case should be hailed as a reasonable and well thought out decision.

Mr. Lounsbury fairly presented his substantive and procedural due process issues to the Oregon Supreme Court in a manner that extended to that court the initial opportunity to decide the constitutional questions posed by his claims of incompetency. The requirements of exhaustion were met. Petitioner Belleque' petition for a writ of certiorari should be rejected.

Respectfully submitted this 22nd day of February, 2005.



Christopher J. Schatz
Attorney for Petitioner-Appellant

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[13] In *Batchelor*, 693 F.2d at 863, the Oregon Attorney General asserted "that the Oregon Supreme Court is a policy-making court, not an error-correcting court, and that it would be inappropriate to require the Oregon Supreme Court to review a large number of petitions in criminal matters to uncover mere trial errors, even those of constitutional magnitude." Responding to the Ninth Circuit's requiring participation by the Oregon Supreme Court in error review as a precondition to federal habeas, in *State v. Nail*, 304 Or. 359, 362-63, 745 P.2d 415, 416 (1987), the Supreme Court characterized the exhaustion doctrine as imposing a "useless expenditure" of resources on the people of Oregon. As the comments of former Justice Leeson demonstrate, *ante* at p. 13, n.8, the Oregon Supreme Court's view of its role as a law articulating, and not an error correcting, court has not changed.

APPENDIX I

S41980

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OREGON

MICHAEL RAY LOUNSBURY,	)	
	)	
Petitioner on review,	)	Trial Court
	)	No. C9112-36586
vs.	)	
	)	CA A79455
	)	
STATE OF OREGON,	)	
	)	
Respondent on review.	)	

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1-25-95

FEB 14 1995

J. Gillette not Participating

PETITION FOR REVIEW OF MICHAEL RAY LOUNSBURY

Petition for Review of the decision of the Court of Appeals on an appeal from the judgment of the Circuit Court for Multnomah County, Honorable Robert P. Jones, Judge.

Opinion Filed: Affirmed Without Opinion, December 21, 1994.
Author of Opinion: Affirmed without opinion.
Concurring Judges: Rossman, P. J., De Muniz, J., and Leeson, J.

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PRAYER FOR REVIEW

Defendant-Appellant, (hereinafter Petitioner), requests this court to take review, reverse the decision of the Court of Appeals, and reverse and remand the case for trial consistent with Petitioner's brief below.

QUESTIONS PRESENTED FOR REVIEW AND PROPOSED RULE

1. Question: Must the trial court adopt a burden of proof when determining whether a defendant is competent to proceed to trial?

Proposed Rule: When ruling on whether or not the criminal defendant can aid and assist or is otherwise competent to proceed, the burden should be on the State to demonstrate by a preponderance of the evidence that the defendant is fit to stand trial. In the alternative, the burden should be on State by clear and convincing evidence.

2. Question: In a single victim aggravated murder, may a defendant receive consecutive life sentences for counts pled in alternative theories under ORS 163.095(2)(d) and (2)(e)?

Proposed Rule: In a single victim murder, the court may impose only one sentence, whether the sentence is death, "true life," or life with possibility of parole.

STATEMENT OF FACTS

Defendant was charged with 11 counts of Aggravated Murder. ORS 163.095. See Indictment, App. 1. Defendant was convicted of all counts. He was sentenced to two consecutive terms of life

imprisonment without possibly of parole. See Judgment, App. 2. On December 21, 1994, the Court of Appeals affirmed without opinion. See App. 4.

Prior to trial, the defense asserted that defendant was not fit to proceed. On July 23, 1992 the first of three hearings was held on the issue. (Tr. 12). On September 9, 1992 evidence was taken. (Tr. 72). This was treated as a contested hearing under ORS 161.370. On September 10, 1992 and again on November 24, 1992, the court ordered the defendant transported to the Oregon State Hospital. On February 5, 1993, a final hearing was held on the issue of fitness. (Supp. Tr. 1). At that proceeding, the trial court found the defendant was competent to stand trial. (Supp. Tr. 50).

Defendant went to trial for the aggravated murder of Adrian Thomas. The facts surrounding the allegations, as well as the evidence produced at trial are summarized in the Statement of Facts in Appellant's Brief below and in Respondent's Brief. Mr. Lounsberry was found guilty of the 11 counts in the Indictment. (Tr. 23, 44). When entering the final judgment in the case, the court merged Counts 1 through 8 and Counts 9 through 11 into two counts. Mr. Lounsbury was then sentenced to two consecutive life sentences without the possibly of parole. App. 2. Defendant appeals the failure to merge all counts, or in the alternative, the consecutive nature of the sentences.

ARGUMENT

I. Burden of Proof in Fitness to Proceed Determinations:

No burden of proof was employed below in making the determination of fitness. Employing a standardless procedure in making this important determination denies defendant protections due under the State and Federal Constitutions, and is inconsistent with Oregon statutory scheme.

At trial the defense requested that the Court establish a burden of proof. App. 3 at 4. The aid and assist statute does not allocate the burden of proof. ORS 161.360 et seq. However, the state statutory standard for civil commitments places the burden on the state, by "clear and convincing evidence." ORS 426.130(1)(b). As argued by the defense, the worst that can happen to a defendant in a civil commitment case is detention for 180 days. Here, the subject of the fitness hearing was charged with aggravated murder. At a bare minimum, a burden of proof equal to the civil commitment procedure should have been allocated in this matter. In Federal competency proceedings, for example, the burden is on the prosecution to demonstrate by a preponderance of the evidence that the defendant is fit to stand trial. United States v. Hoskie, 950 F2d 1388, 1392 (9th Cir 1991).

II. Failure to merge the alternative counts of Aggravated Murder in a single-victim crime, and consecutive life sentences:

Judgment was entered on April 14, 1993. The actual imposition of sentence occurred on March 29, 1993. In imposing the life

sentences without parole, the Court was faced with the issue of merger.

The defense objected to the state's request that two separate convictions be entered, stating "Your honor, the state has failed to cite a case that says you can murder someone twice...a gravamen of the offense is that he caused her death and he did it once and no more than once (sent. Tr. 6).

The Court ruled that "...counts 1 through 8 do merge and 9 through 11 do merge, but the two groups do not merge with each other." (sent. Tr. 7).

The Court of Appeals properly reviewed sentencing order for abuse of discretion. State v. Denkle, 34 Or App 375, 579 P2d 245 (1978).

In imposing the sentences, the Court faced both the issue of merger and the issue of consecutive sentences. The state argued that since Counts 1 through 8 alleged a theory arising under ORS 163.095(2)(e) and the remaining Counts 9 through 11 alleged violations of ORS 163.095(2)(d), that left two unmerged counts. (Sent. Tr. 4). The Court noted that "I'm not sure that the merger issue in this case becomes significant in the sense of the little (sic) [literal] words of the statute life without parole, but I can see some technical reasons for reviewing the matter and making findings." (Id. at 7).

After the Court declined to merge the remaining counts, the state sought consecutive sentences. The Court imposed consecutive sentences as requested by the state. (Id. at 10).

App. 2. The defense further objected to the imposition of consecutive sentences.

Under ORS 161.062(2) the count should merge. The criminal episode violated only one statutory provision, and did not involve "two or more victims." Even though alternative theories existed under two subparagraphs of ORS 163.095(2), the fact remains that it is a single statutory provision under which defendant was prosecuted. Imposing a consecutive sentence on two alternative theories of aggravated murder violates ORS 132.123(2)(4). The criminal offenses here arose from the same continuous and uninterrupted course of conduct. Absent merger, the sentences should have been imposed concurrently.

REASON GIVING THIS CASE IMPORTANCE

This is an aggravated murder case in which the defendant received two consecutive life sentences without possibility of parole. As such it is case which should be closely reviewed.

The two issues on which the Petitioner seeks review are ones on which guidance from the Supreme Court is warranted. First, Oregon is statutory scheme is silent on the critical issue of the burden of proof in a fitness proceeding. Here, defense counsel below argued that their client was not able to aid and assist. He clearly suffered from a mental condition. However, he in fact went forward to trial and is now serving life without parole. No burden of proof was employed in making the determination.

Secondly, at the conclusion of the trial, defendant was sentenced to two consecutive life sentences for a single-victim crime. This result is incongruous, and should not stand.

For the above reasons, it is respectfully requested that this Petition for Review be granted and Petitioner's prayer for reversal be ordered.

Dated this 24 day of January, 1995.

Respectfully submitted,

By: _____

Marc A. Spence, OSB #87349
Of Attorneys for Petitioner
Michael Ray Lounsberry

GJ 40 (D)

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON,	)	
	)	C 91-12-36586
Plaintiff,	)	DA 900589
	)	PPB 91-62190
v.	)	
	)	INDICTMENT FOR VIOLATION OF
MICHAEL RAY LOUNSBURY,	)	
DOB: 11/19/60	)	ORS 163.095 (1-11)
	)	
Defendant.	)	

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CIRCUIT COURT

The above defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 - AGGRAVATED MURDER, committed as follows:

COUNT 1
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the commission of the crime of Kidnapping in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 2
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the commission of the crime of Attempted Rape in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 3
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the commission of the crime of Sexual Abuse in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 4
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the identity of a perpetrator of the crime of Kidnapping in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

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INDICTMENT Dist: Original - Court; Copies: APP 1 Def. Attorney, DA, Pre-Trial

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COUNT 5
AGGRAVATED MURDER

e said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the identity of a perpetrator of the crime of Attempted Rape in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 6
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the identity of a perpetrator of the crime of Attempted Sexual Abuse in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 7
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the commission of the crime of Attempted Assault in the Second Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in ch cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 8
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the identity of a perpetrator of the crime of Attempted Assault in the Second Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 9
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally commit the crime of Kidnapping in the First Degree and in the course of and in furtherance of said crime which the said defendant was committing, the said defendant personally and intentionally did cause the death of another human being to-wit: Adrienne Rebecca Thomas, a person who was not a participant in the crime, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 10
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally attempt to commit the crime of Rape in the First Degree and in the course of and in furtherance of said crime which the said defendant was attempting to commit, the said defendant personally and intentionally did cause the death of another human being to-wit: Adrienne Rebecca Thomas, a person who was not a participant in the crime, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 11
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally commit the crime of Attempted Sexual Abuse in the First Degree and in the course of and in furtherance of said crime which the said defendant was committing, the said defendant personally and intentionally did cause the death of another human being to-wit: Adrienne Rebecca Thomas, a person who was not a participant in the crime, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

Dated at Portland, Oregon, in the county aforesaid on December 27, 1991

Witnesses
Examined Before the Grand Jury:

John Thomas
Chad White
Shirley Zahler
David Simpson

A TRUE BILL

/s/ HAROLD M. PATTERSON
Foreman of the Grand Jury

MICHAEL D. SCHRUNK (67111)
District Attorney
Multnomah County, Oregon

By _____ Deputy

/s/ JENNIFER J. MARTIN, OSB 84285

Security Amount: $ NO BAIL

The District Attorney hereby affirmatively declares for the record, as required by ORS 161.565, upon appearance of the defendant for arraignment, and before the court asks under ORS 135.020 how the defendant pleads to the charge, the State's intention that any misdemeanor charged herein proceed as a misdemeanor.

McINTYRE/82460/rt

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON Plaintiff, v. MICHAEL RAY LOUNSBURY, Defendant.	)	No. C 91-12-36586 DA 900589 JUDGMENT OF CONVICTION AND SENTENCE

On March 29, 1993, this matter came before the court for sentencing proceedings pursuant to ORS 163.105, the plaintiff appearing by James J. McIntyre, Alexander Gordon and Thomas H. Edmonds, Deputy District Attorneys, and the above-named defendant appearing in person with his attorneys, Robert D. Wasson and Laura Graser.

The defendant was tried by a jury, and found GUILTY of the offenses of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 - AGGRAVATED MURDER.

On March 25, 1993, the trial jury answered the questions set forth in ORS 163.150(1)(b), numbers 4 and 5 in the negative and ORS 163.150(1) (b) numbers, 1, 2, 3 in the affirmative.

IT IS ORDERED that said answers be entered of record herein and that the jury be discharged from further consideration of this case.

IT IS FURTHER ORDERED that Counts 1, 2, 3, 4, 5, 6, 7 and 8 merge with each other into Count 1; Counts 9, 10 and 11 merge with each other into Count 9. Therefore, the defendant is convicted of two counts of AGGRAVATED MURDER, Counts 1 and 9.

IT IS ADJUDGED that on Count 1 - AGGRAVATED MURDER, pursuant to ORS 163.105(1)(b), defendant be imprisoned in a correctional facility of the State of Oregon For LIFE, without the possibility of release or parole, and defendant is committed to the legal and physical custody of the Corrections Department of the State of Oregon.

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ROBERT D. WASSON
ATTORNEY AT LAW
16735 SW PACIFIC HWY
TIGARD OR 97224

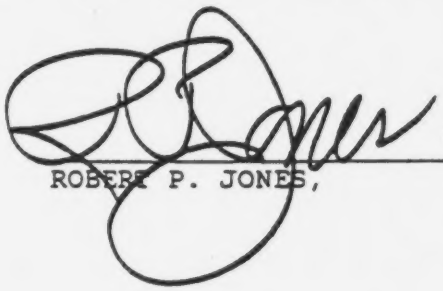
JM:AG:TE:mc:
PPB 91-62190

IT IS FURTHER ADJUDGED that on Count 9 - AGGRAVATED MURDER, pursuant to ORS 163.105(1)(b), defendant be imprisoned in a correctional facility of the State of Oregon for LIFE, said sentence to run consecutively to Count 1 herein, pursuant to ORS 137.123 (4)(A)(B), without the possibility of release or parole, and defendant is committed to the legal and physical custody of the Corrections Department of the State of Oregon.

The court FURTHER FINDS, pursuant to ORS 137.123(4)(A)(B), that the criminal offense in Count 9 for which the consecutive sentence to Count 1 will be given was not merely an incidental violation of a separate statutory provision and that the crime embodied in Counts 1 and 9 separately caused a greater or qualitatively different loss, injury or harm.

Stenographic notes of this proceeding were made by the court reporter, Frances Ragozzino.

DATED: April 12, 1993.



ROBERT P. JONES, Judge

SUBMITTED BY:

James J. McIntyre, OSB 82460
Deputy District Attorney
Multnomah County District Attorney Office
600 Multnomah County Courthouse
Portland, OR 97204

ORIGINAL

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, Plaintiff,	)	No. C91-12-36586
vs.	)	MEMORANDUM OF LAW ON COMPETENCY TO PROCEED
MICHAEL RAY LOUNSBURY Defendant.	)	

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The defendant has moved the court to determine his competence to proceed, and he has argued that he is not competent to proceed. He will present evidence at his third competency hearing on February 5, 1993, that he remains unable to proceed to trial. In this memorandum he will review the state and federal law on the issue, and he will argue that he is not competent to go to trial and is not competent to plead guilty. Although generally the two standards are different, in this capital case the higher standard must be met to force the defendant to stand trial.

Counsel believes they are permitted to make these arguments on behalf of the incompetent defendant. ORS 161.370(5). To do so does not undercut both lawyers' good-faith and sincerely-held beliefs that their client is incompetent.

I. Introduction: "mental disease or defect."

As the court is well aware, one fundamental difference between legal "insanity" and medical "insanity" is described in ORS 161.295(2): by definition in the criminal code, "mental disease or defect" does not include (1) an abnormality manifested only by repeated criminal or otherwise antisocial conduct or (2) or "any abnormality constituting solely a personality disorder."

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Oregon law does not recognize a "personality disorder" as a "mental disease or defect" if the person has solely a personality disorder. People can have a personality disorder and another, legally recognized, disorder. Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised, published by the American Psychiatric Association in 1987. ("DSM-IIIR"), at 336. If the court concludes that Mr. Lounsbury has a personality disorder, he asks the court to focus on the evidence regarding other disorders he expects to establish he has.

II. Competence to stand trial.

The defendant must be competent to stand trial. As a practical matter, the competency issue will often arise when there is a "guilty except for insanity" issue on the merits, but the "GEI" and competency issues are legally unrelated. See, State v. Bostrom, 2 Or App 466, 468, 469 P2d 645 (1970).

Counsel for the defense and for the state have an ethical duty to raise the issue of competence if they have information suggesting that the defendant does not have sufficient present ability to consult with counsel with a reasonable degree of rational understanding and otherwise assist in the defense, and does not have a rational as well as a factual understanding of the proceedings. ABA Criminal Justice Mental Health Standards 7-4.1 to 7-4.2 (1986).

1. State standards for competence to stand trial

ORS 161.360 provides that a defendant cannot stand trial if:

1) As a result of a mental disease or defect, he is unable:

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a) To understand the nature of the proceedings against him, or

b) To assist and cooperate with his lawyer or,

c) To participate in his defense.

Oregon case law is silent on the meaning of these terms. When discussing the GEI defense the drafters of the Model Penal Code wrote, that they did not define "mental disease or defect," "those terms being left open to accommodate developing medical understanding." Model Penal Code § 4.01, Explanatory Note (1985 Ed.) The same approach should be used in the aid and assist context.

Defense counsel have repeatedly asserted that the defendant does not truly understand the nature of the proceedings, although he can parrot back what a prosecutor, a judge, and a jury are. We have also repeatedly said we do not believe that Mr. Lounsbury can aid and assist us. The third criterion is also applicable, and it is the most objective: the defendant cannot participate in his defense because he categorically declines to testify. He has told Mr. Wasson he will not testify under any circumstances. As the court is aware, Mr. Lounsbury has already confessed on an audio tape, and he has no major prior criminal record.

Further, the evidence at the hearing will establish that Mr. Lounsbury's reasons for not considering a plea offer are irrational. He wants to be on death row not because he is remorseful for the homicide, or because he want to die, but because (apparently) he is expecting some sort of revelation about the fate of the world when he is on death row. The Commentary to the ABA Criminal Justice Mental Health Standards 7-4.1 (1986) says

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that to be competent to proceed to trial a defendant must, inter alia, be able to "elect an appropriate plea." The Nebraska Supreme Court set forth 20 factors to consider in determining competency, and one is "that [the defendant] can decide upon a plea." State v. Guatney, 207 Neb 501, 299 NW2d 538, 545 (1980). Under these standards, the ability to evaluate a plea is a component of competence to proceed to trial. There is no authority that this factor is not relevant to the inquiry in Oregon, and we believe the court must consider it, particularly in this capital case. This point will be discussed in more detail below.

2. The burden of proof

The aid and assist statute does not allocate the burden of proof. The state statutory standard for civil commitment places the burden of proof on the state, by "clear and convincing evidence." ORS 426.130(1)(b). The same burden should apply here. Addington v. Texas, 441 US 418, 432-33, 99 SCt 1804, 60 LEd2d 323 (1979) (clear and convincing standard for civil commitment under due process). In a civil commitment case, the worst that can happen is the defendant is placed in custody for 180 days. ORS chap. 426. In this case, the defendant is being forced to go to trial for his life.

Under the federal statute, the burden is on the government, and the government must demonstrate by a preponderance of the evidence that the defendant is competent to stand trial. United States v. Hoskie, 950 F2d 1388, 1392 (9th Cir 1991).

Medina v. California, 505 US ___, 112 SCt 272, 2581, __ L Ed2d__ (1992) is not to the contrary. That case holds that when a state statute expressly places the burden on

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the defendant, the statute is not repugnant to the Due Process Clause. (The California statute places the burden on the defendant to show incompetence, by a balance of probabilities.) However, absent statutory directive, the burden should be placed on the state, because the defendant has a right not be tried while incompetent and the legislature must expressly shift the burden if it is to be shifted.

3. The court's independent and continuing duty to determine competence

When counsel or the court questions the defendant's competence, the court must make a ruling on competence. ORS 161.360-.370. The trial court has an independent duty to assess the defendant's fitness to stand trial whenever it arises. State v. Gillmore, 102 Or App 102, 792 P2d 1242 (1990). This is a continuing obligation, even throughout the trial and during sentencing.

4. Consequences of a finding of incompetence:

If the court finds the defendant to be incompetent to stand trial, the proceedings are suspended, and the defendant would be committed to the hospital. Upon application of the hospital or the person supervising the defendant, or on the court's motion, a hearing can be held to determine if the defendant has become competent. If he is competent, the proceedings are resumed. ORS 161.370(2).

If the defendant remains incompetent and is in the hospital, he cannot be held more than the lesser of either: (1) the maximum amount of time the defendant could serve under the statutory maximum if convicted or (2) five years. However, if the statute of limitations has not run, which of course it would not in this murder case, the state can re-indict and

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the process would begin again. ORS 131.125(1) (no statute of limitations in murder cases.)

5. Federal standards.

Beyond the defendant's state statutory rights, he also has a right under the federal due process clause to be tried only if competent. Pate v. Robinson, 383 US 375, 378, 86 SCt 836, 15 L Ed2d 815 (1966). This is a continuing right; if the court has reason to doubt the defendant's competency at any point, the court can order an evaluation. Drope v. Missouri, 420 US 162, 180-82, 95 SCt 896, 43 L Ed2d 103 (1975).

a) The due process test for competency to stand trial

The federal due process test for competency is: Does the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and does he have "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 US 402, 80 SCt 788, 4 L Ed2d 824 (1960).

A defendant who is able to function with some effectiveness as an adult in the community is not necessarily able to stand trial. He must be able to comprehend and retain explanations of the judicial process so as to be able to participate effectively in his trial. He must be able to understand abstract concepts such as "guilt," "innocence," and "rights." United States v. Hoskie, 950 F2d 1388, 1392-93 (9th Cir 1991).

The "mental disease or defect" language is not a part of the federal standard and there is no reference to a "personality disorder" as under the Oregon statute. If a defendant

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cannot participate because of a personality disorder, he is incompetent. Also, if he cannot participate for some reason other than mental illness, such as acute physical pain, it would violate due process to have a trial.

b) Involuntary administration of medication not permitted

Mr. Lounsbury is now refusing all psychotropic medication. He had one 30-day shot of anti-psychotic medication in the fall, but that has long since worn off. He took Haldol (chemical name: Haloperidol) and very little, if any effect was noticed by anyone, including the jail nurse, the defense psychologist, and counsel. Counsel believe they have the ability to make Clozapine (trade name: Clozaril) available to him, but he firmly declines it. Clozapine is a new (to the country) anti-psychotic drug that in some cases has worked miracles, that is, psychotic people who have not been helped by other drugs respond to Clozapine and return to sanity. Dr. Colbach mentioned the drug during his testimony at a hearing in this case.

If Mr. Lounsbury will not take the drug, or even try it, we cannot force him to do so. There is no evidence that he is a danger to himself or others in the jail.

The court cannot compel the use of anti-psychotic drugs on an incompetent defendant, absent a finding of necessity and medical appropriateness. Riggins v. Nevada, 504 US ___, 112 SCt 1810, 118 L Ed2d 479 (1992). The state can give anti-psychotic drugs to a prison inmate if he is a serious danger to himself or others, if the treatment is in his medical interest, and if there are administrative procedures in place which afford due process. Washington v. Harper, 494 US 210, 110 SCt 1028, 108 L Ed2d 178 (1990). In

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this case, there is insufficient evidence to force medication.

III. Competence to waive rights

Under a due process analysis, there are two standards for competence in an ordinary case. The defendant who pleads guilty, and waives all his trial rights, must have a higher degree of competence than the defendant who goes to trial. The court must scrutinize the defendant's competence carefully at the time of the waiver. A defendant is competent to waive counsel or plead guilty only "if he has the capacity for 'reasoned choice' among the alternatives available to him." Moran v. Godinez, 972 F2d 263, 266 (9th Cir 1992), cert granted sub nom Godinez v. Moran, Dec 14, 1992; Westbrook v. Arizona, 384 US 150, 86 SCt 1320, 16 L Ed2d 429 (1966) (competence to waive right to counsel higher than competence to stand trial).

In this case, as the court is aware, there is a "life offer" available. If the defendant does not take the offer, he goes to trial for his life. This is a common occurrence in this county, and is normally not even worthy of comment to the court. Here, however, the situation is different. The defendant does not have "the capacity for 'reasoned choice' among the alternatives available to him." The evidence has and will establish that Mr. Lounsbury cannot chose to plead guilty; he cannot chose not to plead guilty.

In a capital case, the defendant believes that the Due Process Clause requires that he be able to evaluate a plea before he goes to trial.

IV. Competence to be executed.

Finally, the defense notes that the federal Eighth Amendment prohibits a state from

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inflicting the death penalty on a person who is insane. Ford v. Wainwright, 477 US 399, 106 SCt 2595, 91 LEd2d 335 (1986). It remains uncertain what precisely is required to determine if the defendant is sufficiently competent to be put to death. LaFave and Scott, Substantive Criminal Law (1986 Ed) § 4.4 (1993 supp at 35).

A prisoner cannot be forced to take medication to make him sufficiently sane to be executed. See, Perry v. Louisiana, 498 US ___, 111 SCt 449, 112 L Ed2d 338 (1990).

Conclusion

The defendant cannot aid and assist under the state three-part test, nor does he have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or have "a rational as well as factual understanding of the proceedings against him." This is the federal standard merely to stand trial.

Further, the defendant does not have "the capacity for 'reasoned choice' among the alternatives available to him," the federal standard for pleading guilty. In this capital case, the defendant's ability to evaluate a plea offer is a necessary component of his competence to stand trial.

Both defense lawyers believe that the defendant is not competent to proceed. The state does not appear to question defense counsel's good faith, nor our competence as counsel. To put the matter bluntly, when skilled defense counsel, in good faith, tell the court that they are not being aided and assisted by their client, that should be the end of the matter. In this case, there is powerful corroborating evidence that the defendant is not able to proceed to trial. In this murder case, there is no possibility that the defendant can

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be released before trial; the statute does not permit it and due process does not in any way require it. He must not be forced to trial until he regains his sanity to the point where he can consider a plea offer and can understand the proceedings, can assist and cooperate with his lawyers, and can participate in his defense..

Respectfully submitted,

Laura Graser

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(503) 287-7036

Robert D. Wasson, OSB 71182
Attorneys for the Defendant

Dated: February 3, 1993

Proof of Service

I hereby certify that I served, by personal service, the following, on: Jim McIntyre/Alex Gordon/Tom Edmunds, Deputy District Attorneys, 600 Courthouse, 1021 SW 4th, Portland, Or, 97204, on February 3, 1993, three copies of this memorandum.

Laura Graser

Laura Graser, OSB 79246

FILED: December 21, 1994

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Respondent, v. MICHAEL RAY LOUNSBURY, Appellant.	)	Multnomah County Circuit Court No. C9112-36586
	)	CA A79455

Date argued or submitted on briefs: December 9, 1994

Before: Rossman, Presiding Judge, and De Muniz and Leeson, Judges

Attorney for Appellant: Marc A. Spence

Attorney for Respondent: Virginia L. Linder, Solicitor General

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent.

[ ] No costs allowed.
[ ] Costs allowed, payable by:

In a case in which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

CERTIFICATE OF SERVICE

I, hereby certify that on the 25 day of January, 1995, I served the foregoing PETITION FOR REVIEW on the following party by then depositing in the Post Office at Eugene, Oregon, two true copies in a sealed envelope addressed to the said parties and prepaying postage thereon.

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No. 04-576

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

MICHAEL RAY LOUNSBURY,

Respondent.

Petition for Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Christopher J. Schatz, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the counsel for the Petitioner by depositing in the United States Post Office, in Portland, Oregon on February 22, 2005, first-class postage prepaid, a certified true, exact and full copy thereof addressed to:

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Further, the original and 10 copies were mailed via FedEx to the Honorable William K. Suter, Clerk of the United States Supreme Court, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on February 22, 2005.

DATED this 22nd day of February, 2005.

Christopher J. Schatz
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SUBSCRIBED AND SWORN to before me this 22nd day of February, 2005.

Jill Lammé
Notary Public of Oregon

OFFICIAL SEAL
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(2)

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Petitioner,

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Petition for Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioner Belleque has asked this Court to grant the petition for certiorari to review the Ninth Circuit's decision, which holds that presenting one claim in state court serves to fairly present, for purposes of federal habeas corpus, another "intertwined" claim, that is "sufficiently related" to the one actually raised. *Lounsbury v. Thompson*, 374 F.3d 785, 788 (9th Cir. 2004). Specifically, in this case the federal court of appeal held that Lounsbury fairly presented to the state Supreme Court his substantive claim that he was not competent to stand trial because he raised in his state court petition for review the procedural claim that the trial court had erred by applying no, or the wrong, burden of proof when judging his competency. In response, Lounsbury contends that "as a matter of both text and logic, the Oregon state courts were given the first opportunity to address [his] * * * claim of error * * * that he was [not] sufficiently competent to be brought to trial[.]" (Opp. Br.10). As explained below, he is wrong as to both "text and logic." Moreover, he is wrong in ways that underscore both the errors committed by the Ninth Circuit and the reasons why this case merits this Court's review.

Lounsbury's claim that the "text" of his state Supreme Court petition for review presented his substantive competency claim, in addition to his procedural claim regarding the burden of proof, is based on two aspects of that petition for review. First, the petition included the following sentences: "'Here, defense counsel below argued that their client was not able to aid and assist. He clearly suffered from a mental condition.'" (Opp. Br. 6, quoting Pet. Rev. 5). Second, he attached to his state court petition for review a memorandum of law that had been filed in the trial court. In that memorandum, Lounsbury's attorney contended, in part, that Lounsbury was not competent to stand trial. The memorandum also "set forth the governing federal law with respect to the constitutional

requirements for a valid competency determination." (Opp. Br. 8).

Relying on those aspects of his petition, Lounsbury insists that "any informed reader of [his] Petition for Review would have been aware that the substantive competency determination was still being contested." (Opp. Br. 11). But suggesting that either the inclusion of the two isolated sentences on which he relies, or the mere attachment of a trial court memorandum, serves to fairly present a claim never advanced in any other fashion reinforces the State's point that in this case the Ninth Circuit persisted in committing an error that this Court condemned in *Baldwin v. Reese*, 541 U.S. 27, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004). That error lies in equating the possibility that a state court might find or reach an issue on its own with a federal habeas petitioner's obligation to have fairly presented his federal claims first in state court. In *Reese*, this Court stressed that "[t]o provide the State with the necessary 'opportunity' [to confront the federal issue], the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." 158 L. Ed. 2d at 69 (citations omitted). That is, the prisoner's fair presentation of the federal issue is a necessary prerequisite to providing the state court with the "opportunity" to reach the issue.

Here, although Lounsbury contends that "any informed reader" of his petition for review "would have been aware" he was raising the substantive competency issue (Opp. Br. 11), it is instead extremely unlikely that the text of Lounsbury's petition for review would have caused the state Supreme Court to understand that he was raising that issue in his petition. The only pertinent "question presented" in Lounsbury's petition was whether the trial court had "to adopt a burden of proof when determining whether a defendant is competent to pro-

ceed to trial[.]" (Pet. Rev. 1).[1] He later added that he sought review of "two issues," the "burden of proof" one and an unrelated sentencing claim. (Pet. Rev. 5). Petitions for review must set out the legal questions presented to the court and, if review is allowed, the petitioner "may not raise additional questions or change the substance of the questions already presented." Or. R. App. Proc. 9.05(7)(b) (2004), 9.17(2)(b)(i) (2004).[2] When Lounsbury set out the questions he presented to the court, the court was entitled to take him at his word and was not required to scour the petition for review seeking to identify issues other than the ones "presented."

Furthermore, even if the court had undertaken that task, the "text" on which Lounsbury relies would have permitted at most a guess that he might be pursuing the substantive competency issue. As noted, the sole pertinent question presented in the petition was whether the trial court should have adopted a burden of proof when ruling on Lounsbury's competence to stand trial. (Pet. Rev. 1). The two isolated sentences on which he now relies appear in a section of the petition explaining why that procedural issue supposedly warranted review. After observing that the state statutory scheme "is silent on the critical issue of the burden of proof in a fitness proceeding," Lounsbury's attorney added: "Here, defense counsel *below* argued that their client was unable to aid and assist. He clearly suffered from a mental condition." (Pet. Rev. 5; emphasis added). The observation that defense counsel had made those arguments "below" provided no more than a hint that Lounsbury might still be advancing the same argument in his petition for review.

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[1] The petition for review, including attachments, is appended to Lounsbury's brief in opposition.

[2] Rule 9.05(7)(b) was renumbered in 2005, but its substance remains the same. Or. R. App. Proc. 9.05(4)(b) (2005).

Attaching his trial court memorandum of law to the petition for review provided an even more obscure hint. Four documents were attached to Lounsbury's petition for review – the indictment filed against him, the state trial court judgment, the memorandum of law on which he now relies, and the state Court of Appeals decision, affirming without opinion. Lounsbury mentioned the indictment, the judgment, and the Court of Appeals decision in his petition for review, but he did so only while outlining the procedural history of the case. (Pet. Rev. 1-2). His only mention of the memorandum of law was to note that "[a]t trial the defense requested that the Court establish a burden of proof." (Pet. Rev. 3). He then cited the memorandum. The memorandum of law is ten pages long. Lounsbury never pointed to any other part of it in his petition for review. Other than relying on it to show that he had raised the burden-of-proof issue at trial, he never told the state Supreme Court why it was attached. He never indicated that it was included in order to raise any substantive competency issue.

Although attaching the memorandum undoubtedly gave the state court the opportunity to read it and to see that the substantive claim was included in the memorandum, that "opportunity" was no more adequate than was the state court's opportunity to read a lower court decision, which this Court held was insufficient in *Reese*. To conclude that such an "opportunity" satisfies the fair presentation requirement "would force state appellate judges to alter their ordinary review practices," or else forgo the state's opportunity to consider federal claims in the first instance, would shift the fair presentation requirement from a federal habeas petitioner onto state courts, and "would unjustifiably undercut the considerations of federal-state comity that the exhaustion requirement seeks to promote." 158 L. Ed. 2d at 71.

Lounsbury asserts that his petition for review did not require the state Supreme Court to "'look[] for a needle in a paper haystack.'" (Opp. Br. 18, quoting *Grey v. Hoke*, 933 F.2d 117, 120 (2nd Cir. 1991)). The six-page petition for review that Lounsbury filed may not amount to much of a "paper haystack" but, to shift metaphors, a claim fairly presented in state court should not be one that requires the state court to squint at the tea leaves, read between the lines, guess, or pursue what may or may not be hints. It would have been remarkably easy for Lounsbury simply to say that, in addition to the burden-of-proof issue he raised, he also claimed that the trial court had erred in making its substantive ruling on his competency. He did not do that, however, and the onus should not shift onto the state courts to make up for what he failed to do.

Lounsbury's second reason for contending that his petition for review fairly presented his substantive competency claim is that the substantive claim "is a logical corollary to the procedural issue[.]" (Opp. Br. 7). According to Lounsbury, the substantive issue "was necessarily included within the presentation of the" procedural one. "[I]n other words, had the Oregon Supreme Court undertaken to resolve the procedural issue presented by the text of the Petition for Review, its analysis would necessarily have encompassed the state trial court's decision with respect to the substantive issue[.]" (Opp. Br. 7).

As is discussed below, Lounsbury's assumption about what might have happened if the state Supreme Court had accepted his case for review is not necessarily correct. More importantly, however, his suggested principle of "logical connectivity" (Opp. Br. 16), far from representing a narrow exception to or expansion on the "fair presentation" requirement, instead would undercut that requirement to a significant degree. The first flaw in Lounsbury's argument is that it at-

tempts to substitute what a court might have done had review been granted for a federal habeas petitioner's obligation to fairly present his federal claims in state court. Simply put, the issue is whether Lounsbury fairly presented his substantive competency claim in his petition for review, not what the court would have done had review been granted. And, if every issue that a court might reach in the course of its review is for that reason alone fairly presented, then the fair presentation requirement would become even more difficult to administer than it is now. Identifying the issues a court might have reached on review would often be an uncertain and speculative task.[3]

Moreover, Lounsbury's "logical connection" argument also harkens back to a point made by the Ninth Circuit in this case and criticized in the State's petition for certiorari. The Ninth Circuit suggested that Lounsbury's attorneys must have meant to include the substantive competency claim in the petition for review because otherwise the court would have "to impute a strategic choice to abandon the substantive claim." 374 F.3d at 788. That approach, the State has argued, distorts the analysis, which should focus on fair presentation, and not on the reasons why a claim might or might not have been raised in state court. (Pet. 26-27). Lounsbury goes even further than the Ninth Circuit and suggests that procedural default requires an affirmative "waive[r] or intentional relinquish[ment]" of a claim. (Opp. Br. 11). That suggestion

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[3] Lounsbury contends that "it may be assumed" that, in denying his petition for review, the Oregon Supreme Court considered "what would have taken place had review been granted." (Opp. Br. 17). That "assumption" seems unlikely to be accurate given the "serious burden[s] upon judges of state appellate courts, particularly those with discretionary review powers. Those courts have heavy workloads[.]" *Reese*, 158 L. Ed. 2d at 71.

would subvert the fair presentation requirement and distort it beyond all recognition.

In all events, Lounsbury's confident assumptions about what the Oregon Supreme Court would have done had it granted review are not necessarily correct. As noted, Lounsbury assumes that, had the court granted review to consider the procedural issue, it would have reached the substantive issue as well. (Opp. Br. 7, 16). As Lounsbury points out, the trial court record does not reveal "what burden of proof the trial court actually applied." (Opp. Br. 7 n. 6). When the Oregon Supreme Court resolves a legal issue, such as the burden of proof that applies in making a competency decision, although it can reach the merits, its more common practice is to remand to allow a lower court or administrative agency to apply the correct legal standard in the first instance. *See Redman Industries, Inc. v. Lang,* 326 Or. 32, 41 n. 5, 943 P.2d 208 (1997) (noting, but deviating from, court's "typical" practice of remanding); *Gage v. City of Portland,* 319 Or. 308, 317, 877 P.2d 1187 (1994) (because agency applied incorrect standard of review, court remands to allow agency to apply the correct standard "in the first instance"); *Harris v. SAIF*, 292 Or. 683, 697, 642 P.2d 1147 (1982) (because court cannot tell whether lower tribunals "applied the correct rule of law and whether they would have reached the same result, in their fact finding function, under the analysis set out above, the matter must be remanded").[4]

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[4] The fact that the substantive competency issue could have been reached by the Oregon Supreme Court on review, or by a lower court on remand, may seem to lend weight to Lounsbury's "logical connectivity" argument. And admittedly, the burden-of-proof issue seems a bit adrift unless it is anchored to a claim that the trial court reached the wrong result. But the pivotal issue here nonetheless remains whether Lounsbury fairly presented the substantive issue, not what the Oregon Supreme Court might have

Lounsbury also contends that he should be excused from including the substantive competency issue in his state petition for review because the Oregon Supreme Court is primarily a "law announcing" court that, among other factors that may lead it to a grant of discretionary review, may consider whether a case "presents a significant issue of law." Or. R. App. Proc. 9.07(1). (Opp. Br. 12-15). As discussed in the State's petition seeking certiorari, nothing in the rule prohibits the inclusion of a fact or case specific claim in a petition for review. (Pet. 23).[5] Furthermore, Lounsbury's argument overlooks the striking resemblance between the Oregon Supreme Court's rules and the Illinois rule considered by this Court in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

That rule, which guided that state court's exercise of its discretionary review function, also suggested that "the general importance of the question presented" was among the factors that "indicate the character of reasons which will be considered" by the court in deciding whether to grant review. *O'Sullivan*, 526 U.S. at 843.[6] In ruling that "state prisoners

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done on review or ordered to be done on remand, and not why Lounsbury did nor did not fairly present the claim.

[5] In this case, for example, Lounsbury could have argued that the burden-of-proof issue was significant and thus worthy of review, while adding that a decision regarding the applicable burden of proof should lead to reversal of the trial court's substantive competency decision. Such a simple addition would have preserved the substantive issue without violating the state court's rules or diminishing whatever force the procedural issue might have had.

[6] The Oregon rule, much like the Illinois one, provides that the Supreme Court "considers the items set out [in the rule] to be relevant to the decision whether to grant discretionary review." The Oregon "criteria are published to inform and assist the bar and the public." "They are," however, "neither exclusive nor binding. The court retains the inherent authority to allow or deny any petition for

must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established review process," this Court rejected the argument that the state rule "ma[d]e the intermediate appellate courts the primary focus of the system," to which "all routine claims of error" were directed, thus excusing any need to present such claims to the state supreme court. 526 U.S. at 845. The state court was "free to take cases that do not fall easily within the descriptions listed in the Rule," and even if the rule were read as "discourag[ing] the filing of certain petitions, it [would be] difficult to discern which cases fall into the 'discouraged' category." *Id.* at 846. "The better reading" of the rule was that the court "has the opportunity to *decide* which cases it will consider on the merits." *Id.* (emphasis in original). Thus, review in the state supreme court was not "unavailable." *Id.*

A state court system might make discretionary review unavailable in some instances, but to do so the state should "ma[k]e it plain that it does not wish to require such applications before its petitioners may seek federal habeas relief." *Id.* at 849 (Souter, J., concurring). The state rule at issue in *O'Sullivan* did not do that, and neither does the Oregon rule. In sum, Lounsbury's reading of the Oregon rules of appellate procedure is at odds with this Court's reading of the very similar rule that was interpreted in *O'Sullivan*. Lounsbury advances arguments that this Court, in effect, already has rejected in that case.

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review." Or. R. App. Proc. 9.07. The similarity between the state court rule considered in *O'Sullivan* and the Oregon rule belies Lounsbury's suggestion that there is something odd, or "antithetical" to "this Court's directives concerning habeas procedure," in Oregon's "policies and procedures" regarding discretionary review. (Opp. Br. 21).

CONCLUSION

For the reasons given here, as well as the reasons set out in the State's petition, the State respectfully requests that this Court grant the petition for a writ of certiorari and reverse the decision of the court below. Alternatively, the Court may wish to consider summary reversal.

Respectfully submitted,

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